Supreme Court, U.S.
FILED
991506 MAR 09 2000
OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

CERIDIAN CORPORATION, a Delaware corporation, individually and as successor in interest to Control Data Corporation,

Petitioner,

vs.

KENT P. BARKER, CARLA J. MCANDREWS and MARTIN J. TIMMONS, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard A. Kaplan
Counsel of Record
Madge S. Thorsen
KELLY & BERENS, P.A.
3720 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 349-6171

Attorneys for Petitioner

2000 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

11 4 pp

QUESTION PRESENTED FOR REVIEW

An employer amended an ERISA employee benefits plan to require disabled employees to share in the costs of their health, dental and life insurance coverage (hereinafter "welfare benefits"). The disabled employees brought suit under sections 502(a)(1) and (3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (3), asserting that they had a vested, or unalterable, entitlement to free welfare benefits. Petitioner's plan documents and summary descriptions provide for free welfare benefits throughout the period of disability, but also incorporate provisions reserving petitioner's statutory right to amend or discontinue the welfare benefits plan. The reservation provisions contain no language of limitation. The legal question presented is:

> Whether ERISA employee welfare plan documents and summary descriptions can be deemed ambiguous *per se* with respect to vesting when they contain both a provision for continuing or ongoing benefits and a general reservation of the right to change or terminate the plan.

PARTIES BELOW

Petitioner, Ceridian Corporation (the former Control Data Corporation), was defendant and appellee in the courts below. Respondents in the courts below (as plaintiffs and appellants) were Kent P. Barker, Carla J. McAndrews and Martin J. Timmons (on behalf of themselves and as representatives of a class of persons similarly situated).

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, the Court is advised that petitioner is a publicly-traded company with no parent company and no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

Question Presented i

Parties ii

Rule 29.1 Statement iii

Table of Contents iv

Table of Authorities vi

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of the Basis of Jurisdiction of the Supreme Court 1

Relevant Statutes 2

Statement of the Case 3

Reasons for Granting the Writ 6

I. The circuits are in conflict over whether ERISA employee welfare plans can be deemed ambiguous with respect to vesting when they contain both a statement that certain benefits will continue or be ongoing and a general reservation of rights to change the plans 6

II. The Eighth Circuit's per se rule and its consequences frustrate Congressional intent to ensure that benefit determinations are based on the language of the written ERISA plan 11

Conclusion 14

Appendix Table of Contents ..... A-i

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Avondale Industrial Inc., 905 F.2d 943 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990) 8

American Federation of Grain Millers v. International Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997) 7, 9

Barker v. Ceridian Corp., 122 F.3d 628, 635 (8th Cir. 1997) 1, 4, 5, 7

Barker v. Ceridian Corp., 193 F.3d 976, 983 n.2 (8th Cir. 1999) 1, 5, 9, 11, 13, 14

Barker v. Ceridian Corp., 918 F. Supp. 1298 (D. Minn. 1996) 1, 4

Chiles v. Ceridian Corp., 95 F.3d 1505 (10th Cir. 1996) 7, 8, 10

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) 7, 8

Diehl v. Twin Disc, Inc., 102 F.3d 301 (7th Cir. 1996) 7, 9

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6

Frahm v. Equitable Life Assurance Society of the United States, 137 F.3d 955, 959,-960 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 55 (1998) 11

Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995) 8

Herzberger v. Standard Insurance Co., 2000 W.L 202653 (7th Cir. 2000) (Posner, J.) 10

Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 9

Massachusetts Mutual Life Insurance v. Russell, 473 U.S. 134 (1985) 13

Moore v. Metropolitan Life Insurance Co., 856 F.2d 488 (2d Cir. 1988) 7, 9

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 13

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998), *cert. denied*, 524 U.S. 923 (1998) 8, 12

In re Unisys Corp. Retiree Med. Benefits ERISA Litigation, 58 F.3d 896, 902-03 (3d Cir. 1995) 8

Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993), *cert. denied*, 510 U.S. 870 (1993) 8

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq* 2, 3

29 U.S.C. § 1002(1) 2

29 U.S.C. § 1051(a)(1) 7

29 U.S.C. §1051(1) 2

29 U.S.C. § 1081(a)(1) 7

29 U.S.C. §1102(a)(1) 2, 11

29 U.S.C. §§1132(a)(1) and (3) i

PETITION FOR WRIT OF CERTIORARI

Petitioner Ceridian respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case, filed on October 21, 1999 (A-1-19), rehearing and suggestion for rehearing *en banc* denied on December 10, 1999 (A-20-21).

The circuits are in conflict and confusion regarding the issue decided by the Eighth Circuit: whether, as a matter of law, a general reservation of rights in an ERISA welfare benefit plan can be deemed ambiguous with respect to vesting solely because the plan also contains a provision for continued or lifetime benefits. This legal question begs for resolution by this Court, to the lasting benefit of plan administrators, employers and employees alike.

OPINIONS BELOW

The opinion of the court of appeals is reported at 193 F.3d 976 and is reprinted in the Appendix hereto at A-1-19. The district court's findings and conclusions and order after trial are unreported and reprinted at A-22-35. A prior opinion of the court of appeals is reported at 122 F.3d 628 and reprinted at A-60-88. A prior opinion and order of the district court is reported at 918 F. Supp. 1298 and reprinted at A-36-59. The appellate court's denial of rehearing and suggestion for rehearing *en banc* is unreported and reprinted at A-20-21.

JURISDICTION

The Court of Appeals for the Eighth Circuit issued its opinion, order and judgment on October 21, 1999 (A-1-19). The court denied rehearing and rehearing *en banc* on December 10, 1999 (A-20-21), and this petition was filed

within 90 days after that denial. The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001 *et seq.* (ERISA), and in particular the following provisions:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .

29 U.S.C. §1002(1)

> This part [ERISA, Title I, Part 2, Participation and Vesting] shall apply to any employee benefit plan . . . other than -
>
> (1) an employee welfare benefit plan . . .

29 U.S.C. §1051(1)

> (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. . . .

29 U.S.C. §1102(a)(1)

STATEMENT OF THE CASE

For many years, petitioner, Ceridian Corporation (formerly Control Data Corporation) provided respondents, a class of its employees who became disabled between 1977 and December 31, 1990, free health, dental and life insurance coverages for themselves and their dependents. Petitioner's summary plan descriptions ("SPDs") had provided for continuation of these free welfare benefits "while you are disabled" until death or age 65, subject to the reservation that "while [the company] expects to continue the [plans] indefinitely, it must reserve the right to change or discontinue [them] if necessary." (A-51-52). This reservation clause is "general" in the sense that it does not purport to exclude any plan participant or group from its reach and contains no language of limitation. Similarly, the underlying formal plan documents confirm that all welfare plan benefits are subject to change. A provision in the formal plan states that changes can be applied equally to "all Participants," defined as anyone enrolled in the plan (A-17, A-89), defined...(A-90).

Amidst a drastic downsizing of its operations and employee base, petitioner amended its welfare benefit plans effective January 1, 1994 to require respondents to share a portion of the costs; all other employees, including the newly disabled, were required to do the same. Respondents sued under section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq., alleging that petitioner's plan documents created vested, or unalterable rights to receive these welfare benefits free of charge, notwithstanding petitioner's reservation of rights. Respondents asserted federal question jurisdiction under 28 U.S.C. § 1331.

On cross motions for summary judgment, the District Court held that the reservation of rights provisions in the SPDs were clear and unambiguous, plainly qualified the

provision for ongoing benefits, and therefore as a matter of law precluded a finding of vesting. *Barker v. Ceridian Corp.*, 918 F. Supp. 1298 (D. Minn. 1996) (A-36-59).

On the first appeal ("*Barker I*"), the Eighth Circuit observed that how to construe a reservation of rights together with an affirmation of ongoing benefits was a "puzzling question" and acknowledged that "other courts have not answered this puzzling question uniformly." The Eighth Circuit held that Ceridian's general reservation of rights, although on its face applicable to all employees, was nevertheless ambiguous. The court indicated that the source of ambiguity was not just the "promise" of ongoing benefits, but other significant language found in a separate termination clause in the SPDs. On that basis, the court reversed and remanded for trial regarding Ceridian's intent. *Barker v. Ceridian Corp.*, 122 F.3d 628, 635-36 (8th Cir. 1997)("*Barker I*") (A-79-83).

At trial, respondents argued that the reservation of rights provision was itself ambiguous, whatever the impact of the termination clause, and sought to prove that the reservation did not apply to the currently disabled. Toward that end, the District Court permitted them to call witnesses, including former employee benefits managers, to testify about a wide range of subjects -- including their purported subjective understandings or notions regarding the intent to vest; corporate communications that failed to indicate the absence of vesting; and a corporate culture supportive of employees and particularly the disabled.

In the end, however, respondents failed to persuade the District Court. It found that the termination clause applied only to a separate income replacement insurance provision and thus was irrelevant to construing the reservation of rights (A-28). Having disposed of that potential source of ambiguity, the District Court focused on the reservation of rights as such. Based on the evidence, including the

testimony of the drafter of Ceridian's formal plan documents, the District Court found that Ceridian had no intent to vest welfare benefits and that the reservation clause plainly applied generally to all plan participants. Plaintiffs again appealed.

Reversing a second time, the Eighth Circuit Court of Appeals indicated that its earlier finding of ambiguity in *Barker I* was not dependent on the termination clause; indeed, this time around, the class asserted repeatedly that the termination clause was irrelevant. *Barker v. Ceridian Corp.*, 193 F.3d 976, 983 n.2 (8th Cir. 1999) ("*Barker II*") (A-18-19). Turning away from that issue, the Eighth Circuit found instead that the mere juxtaposition of a general reservation of rights clause in the same plan as a provision for ongoing benefits alone created ambiguity.[1] *Id.* at 981-83 (A-12-19). In other words, the court adopted a *per se* rule: if both a general reservation of rights and a provision for ongoing benefits appear together in an ERISA welfare benefits plan, the reservation is ambiguous.

To resolve the ambiguity, the court rejected as legally irrelevant the formal Plan documents. It reasoned, paradoxically, that the reservation of rights in the formal Plan which specifically stated that the right to change the plan applied to "all Participants" was in conflict with the reservation provisions in the SPDs, which were general on

[1] Assuming its conclusion, the Court recited that if Ceridian could change the benefits, then the "promise" of ongoing benefits was rendered illusory. The Court did not comment on the fact that if Ceridian could not change the benefits, the reservation of rights was rendered "illusory." This illustrates quite clearly the need for a guiding principle of construction; the extraordinary act of vesting an entitlement ought not to rest on outcome driven, circular reasoning. Absent the clearest of language, the presumption should be that there was no intent to vest.

their face and did not except anyone.[2] The Court then went on to review the evidence and to find vesting based on its preference for the testimony of plaintiffs' witnesses about their subjective intentions and understandings years earlier, which testimony the District Court had heard live and found unpersuasive. The necessity for reliance on this kind of evidence is the natural consequence of a *per se* ambiguity rule.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER ERISA EMPLOYEE WELFARE PLANS CAN BE DEEMED AMBIGUOUS WITH RESPECT TO VESTING WHEN THEY CONTAIN BOTH A STATEMENT THAT CERTAIN BENEFITS WILL CONTINUE OR BE ONGOING AND A GENERAL RESERVATION OF RIGHTS TO CHANGE THE PLANS.

This Court should grant the petition to resolve the conflicts in the circuits concerning the proper interpretation of ERISA welfare plans that contain both a provision for

---

[2] A reservation clause which makes no exceptions regarding to whom it applies does not conflict with a reservation which specifies that it includes "all." Here, the formal plan should have assisted in confirming that the SPDs, by making no exceptions, were in fact intended to include "all." The Eighth Circuit's rejection of the formal plan instrument as a tool to ascertaining the settlor's intent violated the principles of trust construction that this Court articulated and held applicable to ERISA plans in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989)(if language of a particular clause is ambiguous, the court is required to look first to the trust instrument as a whole to resolve the ambiguity, and only if unable to do so is it appropriate to turn to extrinsic evidence).

benefits throughout disability (or retirement or "for life") and a general reservation of the employer's rights to change or discontinue the plan. Increasingly, the courts of appeals are themselves recognizing the lack of uniformity in their decisions on these fundamental ERISA matters. *See, e.g., American Fed'n of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997)("the circuits disagree as to exactly what language is required to create a promise to vest ... [welfare] benefits"); *Barker I*, 122 F.3d at 635 (courts "have not answered this puzzling question uniformly") (A-80); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511-12 (10th Cir. 1996)(noting conflicts over these "difficult issues of interpretation"); *cf. Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996).

This Court has observed repeatedly that employers are free to provide welfare benefits without creating vested rights. ERISA "does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under [ERISA], for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). ERISA does not establish "minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Id. See* 29 U.S.C. § 1051(a)(1)(exempting "employee welfare benefit plans from any such requirements"); 29 U.S.C. § 1081(a)(1) (same).

"Automatic vesting was rejected [by Congress] because the costs of [health] plans are subject to fluctuating and unpredictable variables. . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2nd Cir.

1988). "Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." *Adams v. Avondale Indus. Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)(discussing legislative history), *cert. denied*, 498 U.S. 984 (1990), *cited with approval in Curtiss-Wright*, 514 U.S. at 78.

Accordingly, some courts correctly impose strict standards for finding vesting of welfare benefits. A "commitment to vest such benefits is not to be inferred lightly; the intent to vest 'must be found in the plan documents and must be stated in clear and express language.'" *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998)(en banc), *cert. denied*, 524 U.S. 923 (1998), quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993), *cert. denied*, 510 U.S. 870 (1993). *See also In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995).

Consistent with that approach, these same circuit courts and others hold that a reservation of rights provision such as Petitioner's qualifies a provision for ongoing or lifetime benefits and therefore ordinarily precludes a finding of vesting as a matter of law. For example, *Sprague v. General Motors Corp.*, *supra*, involved a welfare plan providing "lifetime benefits" to retirees and a reservation of rights clause that in sum and substance was identical to the one at issue here. The court reaffirmed the Sixth Circuit's rule that when a plan provides lifetime benefits but also contains a general reservation of rights to change or terminate the plan, the plan unambiguously retains the company's right to amend and the reservation governs. *Accord, Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510-14 (10th Cir. 1996); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, *supra*, 58 F.3d

at 902-03; *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988)(where benefits are for an employee's "lifetime" and "at no cost," but plan includes a general reservation of right to change or discontinue medical expense plans, reservation governs).

By contrast, other Circuit courts have adopted a standard that is more elastic and presents a lower bar to vesting. "[A]ny promise to provide vested benefits must be 'incorporated, *in some fashion*, into the formal written ERISA plan.'" *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). The Second Circuit, too, has apparently moved in this direction since the case of *Moore v. Metropolitan Life Ins., Co., supra,* was decided. In the more recent case of *American Fed'n of Grain Millers v. International Multifoods Corp., supra,* 116 F.3d at 980, the court said that "[i]n this circuit, to reach a trier of fact, [i]t is enough [to] point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest [the recipient's] benefits." There, however, the court found that there was no such language in the plan. *Id.* at 980-81.

Barker II goes one step further and removes any realistic bar to vesting through the adoption of a *per se* rule which eviscerates "the presumption that welfare benefits do not vest ...." *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996). Under *Barker II*, the presumption is that a general reservation of rights juxtaposed with a provision for continuing benefits is ambiguous; that extrinsic evidence will be necessary to determine intent; and that a finding of vesting may be based, not on plan language, but on recollections and preferences of members of the class.

If the courts exhibit this degree of inconsisteney and uncertainty, employers, employees, plan administrators and drafters are left equally confused. Indeed, any employer with nationwide operations is subjected to inconsistent

interpretations of the same plan, as Ceridian itself has been.[3] *cf. Herzberger v. Standard Insurance Co.*, 2000 WL 202653*1 (7th Cir. 2000) (Posner, J.) (In a national economy where employers transfer employees from state to state, "[i]t is highly desirable to have a uniform national rule [of ERISA plan construction].") Without a clear rule of construction about a matter so basic as the legal sufficiency of reservation of rights clauses, the Congressional purpose of providing maximum flexibility under ERISA is defeated. So, too, is the Congressional goal of ensuring that the interpretation of ERISA plans is faithful to the written word.

The conflicts will persist without resolution by this Court. Retirees are a booming demographic group and precisely the same legal issues affect them equally. Skyrocketing costs of health care, downsizing of corporate operations, business cycles generally and downturns in particular industry segments, which affected this petitioner's decision to alter free welfare benefits by requiring a modest cost-sharing for disabled employees, will continue to affect employers throughout the country, and this issue will continue to be presented.

The fundamental legal question - the search for a sound rule of construction - is not dependent upon any factual variations between ERISA plans or the precise language used. Rather, the overarching question is the interplay of language reserving rights with language describing an employer's intended goals for the future. The question is significant and the arguments regarding the issue have been fully developed on every side by the lower courts. This Court should grant the writ to resolve the conflicts among the circuits and settle the issue so that employers and employees alike will have the

---

[3] In *Chiles v. Ceridian Corp., supra,* 95 F.3d 1505 at 1510-14, the Tenth Circuit found that there was no vesting upon disability, based on the same plan documents interpreted in Barker.

certainty and consistency of interpretation that Congress mandated.

II. THE EIGHTH CIRCUIT'S *PER SE* RULE AND ITS CONSEQUENCES FRUSTRATE CONGRESSIONAL INTENT TO ENSURE THAT BENEFIT DETERMINATIONS ARE BASED ON THE LANGUAGE OF THE WRITTEN ERISA PLAN.

This Court should grant the petition for the additional reason that a lower threshold for finding vesting and particularly a *per se* rule of ambiguity leads inevitably to departure from the written instruments and reliance on extrinsic evidence as the basis for decision. It is one thing to use extrinsic evidence to clarify ambiguous language; it is quite another to use it to determine the content of the Plan itself. The latter frustrates Congress's intent to make plan documents themselves controlling. ERISA requires all employee benefit plans to be established by written instruments. 29 U.S.C. § 1102(a)(1). This requirement, and the related requirements that employers provide participants with written summary plan descriptions, and furnish the full text of the plans on request, "[a]ll . . . suppose that the written terms are the effective terms." *Frahm v. Equitable Life Assurance Society of the United States*, 137 F.3d 955, 960 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 55 (1998).

The *Barker II* rule, which bases the vesting determination in every case on extrinsic evidence, creates a host of problems, which were comprehensively discussed in *Frahm*, *supra*, 137 F.3d 955. The court, speaking through Judge Easterbrook, made crystally clear the need for rules of decision that focus first and foremost on plan language:

> ERISA requires firms to establish their plans in writing, to provide participants with written summary plan descriptions, and to furnish the full text of the plans on request. All of these provisions suppose that the written terms are the effective terms. Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position. Employers could do little to protect themselves against such claims -- which is why ERISA calls for writings.... What is more (and perhaps worse), binding the plan's sponsor to the oral advice of its benefits staff might lead the employer to discontinue giving advice, telling participants to read the documents and draw their own conclusions. That step would protect employers, but it very likely would increase the level of misunderstanding among participants.

Id. at 960. The Court also noted that even "[s]ome benefits counselors may have had trouble distinguishing statements of the Equitable's current intention from statements about the contents of the plan. Some readers must have mentally added the word 'unreduced' after a word such as 'lifetime'." *Id.* at 959. But the point is that ERISA does not and cannot realistically guarantee "accurate information at all times and for the indefinite future," *Id.* at 959-960; and does not require the company to tell plan participants "at every possible opportunity that which it had told them many times before -- namely, that the terms of the plan were subject to change." *Id.* at 960, quoting *Sprague v. General Motors Corp*, 133 F.3d

388, 405 (6th Cir. 1998)(en banc), *cert. denied*, 524 U.S. 923 (1998).

ERISA is a "comprehensive legislative scheme designed to protect both employers and employees." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). *See also Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134, 148 (1985). By departing from the written language of an ERISA plan, the *Barker II* rule deprives employers of the protections that Congress intended them to have.

CONCLUSION

This Court should grant the writ because the decision below is contrary to congressional intent; conflicts with the decisions of other circuits and the rules of construction articulated by this Court; and, most basically, promotes uncertainty about matters that should be settled by one clear rule that drafters can rely on and employees can understand. Under *Barker II* plans already drafted in reliance on the strength of a reservation of rights will be deemed ambiguous if they also contain promises or statements about the future. While drafters may be able to adjust in the future for the *Barker* result, they cannot adjust for all of the conflicting and inconsistent approaches taken nationwide. The petition for a writ of certiorari should be granted.

Dated: March __, 2000

KELLY & BERENS, P.A.
Richard A. Kaplan (#53661)
Counsel of Record
Madge S. Thorsen
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

Attorneys for Petitioners

APPENDIX
TABLE OF CONTENTS

Barker v. Ceridian Corp., 193 F.3d 976 (8th Cir. 1999) A-1-19

Order Denying Petition for Rehearing and for Rehearing En Banc dated December 10, 1999 ..... A-20-21

Findings of Fact, Conclusions of Law, and Order for Judgment dated January 4, 1999 ..... A-22-35

Barker v. Ceridian Corp., 918 F. Supp. 1298 (D. Minn. 1996) A-36-59

Barker v. Ceridian Corp., 122 F.3d 628 (8th Cir. 1997) A-60-88

Excerpts from Ceridian's Long Term Disability Plan A-89-90

23 Employee Benefits Cas. 1996

Kent P. BARKER; Carla J. McAndrews; Martin J. Timmons, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

CERIDIAN CORPORATION, a Delaware, corporation, individually and as successor in interest to Control Data Corporation, Defendant-Appellee.

No. 99-1434.
United States Court of Appeals,
Eighth Circuit.
Submitted: May 11, 1999.
Filed: Oct. 21, 1999.

Disabled participants brought class action against employer alleging that employer's refusal to continue paying full cost of their insurance premiums under employee benefit plan violated the Employee Retirement Income Security Act (ERISA). The United States District Court for the District of Minnesota, David Doty, J., 918 F.Supp. 1298, granted employer's motion for summary judgment. The Court of Appeals, 122 F.3d 628, reversed and remanded with directions to consider extrinsic evidence as to whether employer intended premium payment benefit to vest at time of disability. On remand, the District Court, Doty, J., found that termination clause's assurance of continued coverage after disability did not apply to premium benefit and entered judgment for employer. Participants appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that finding that employer never intended to give disabled participants a vested right to payment of their insurance premiums under

ambiguous plan provisions was clearly erroneous, in light of unrebutted testimony of drafter of summary plan description that reservation of rights to change or terminate plan as described in summary was not intended to affect participants already disabled at time of plan change.

Reversed and remanded.

1. FEDERAL COURTS 855.1
   170B ----
   170BVIII Courts of Appeals
   170BVIII(K) Scope, Standards, and Extent
   170BVIII(K)5 Questions of Fact, Verdicts and Findings
   I70Bk855 Particular Actions and Proceedings, Verdicts and Findings
   170Bk855.1 In general.
C.A.8 (Minn.) 1999.
The district court's determination of the settlor's intent in executing an ambiguous instrument is a question of fact, reviewable only for clear error.

2. FEDERAL COURTS 852
   170B ----
   170BVIII Courts of Appeals
   170BVIII(K) Scope, Standards, and Extent
   170BVIII(K)5 Questions of Fact, Verdicts and Findings
   170Bk852 What constitutes clear error, and effect thereof.
C.A.8 (Minn.) 1999.
A finding that is contrary to the only testimony presented on a question may properly be considered clearly erroneous.

3. PENSIONS 141
   296 ----
   296II Employee Pension and Benefit Plans

296II(K) Actions to Recover Benefits
296k141 Evidence and fact questions.
C.A.8 (Minn.) 1999.

In suit by disabled participants alleging that employer's refusal to continue to pay their insurance premiums violated vested rights under prior versions of employee benefit plans, finding that termination clause's assurance of continued coverage after disability did not apply to premium benefit ignored the other abundant evidence that employer did not intend premium benefit to be amendable with respect to participant who was already disabled. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

4. PENSIONS 30
296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k27 Validity of Plan; Statutory Regulation
296k30 Written agreement requirement.

[See headnote text below]

4. PENSIONS 65
296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k65 Amendment of plan.
C.A.8 (Minn.) 1999.

Informal statements by an employer's representatives about benefits do not legally alter an ERISA plan, which is required by statute to be written. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

5. PENSIONS 86

296 ----

296II Employee Pension and Benefit Plans

296II(D) Governmental Supervision

296k83 Judicial Supervision and Review

296k86 Evidence.

C.A.8 (Minn.) 1999.

In a case involving ambiguous written instruments, the contemporaneous interpretation of the instrument by the employer is relevant evidence as to the settlor's intent. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

6. PENSIONS 141

296 ----

296II Employee Pension and Benefit Plans

296II(K) Actions to Recover Benefits

296k141 Evidence and fact questions.

C.A.8 (Minn.) 1999,

Evidence that an employer has in the past limited plan changes to those who were not yet in claim status may be relevant in determining whether participants in claim status have vested right to benefits, depending upon surrounding circumstances. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

7. PENSIONS 26

296 ----

296II Employee Pension and Benefit Plans

296II(A) In General

296k24 Contractual Plans; Trusts

296k26 Construction in general.

C.A.8 (Minn.) 1999.

Where the formal plan and the summary plan description conflict, the employer is bound by the provisions of the

summary plan description. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

8. PENSIONS 141
   296 ----
   296II Employee Pension and Benefit Plans
   296II(K) Actions to Recover Benefits
   296k141 Evidence and fact questions.

C.A.8 (Minn.) 1999.

Finding of district court that employer never intended to give disabled participants a vested right to payment of their insurance premiums under ambiguous summary plan provisions was clearly erroneous, in light of unrebutted testimony of drafter of summary plan description, that reservation of rights to change or discontinue long-term disability plan was meant to apply only to participants who were not on disability at time of any future amendment as well as testimony from participants that employer's representatives so interpreted reservation of rights at time it promulgated summary plan descriptions. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

9. PENSIONS 102
   296 ----
   296II Employee Pension and Benefit Plans
   296II(E) Contributions
   296k102 Employees for whom contributions must be made.

C.A.8 (Minn.) 1999.

Disabled participants in long-term disability plan had vested right to payment of other insurance premiums by employer, notwithstanding provision in plan summary reserving right to change or terminate plan in future, where provision was intended to apply only to those participants who were not on

disability at the time of any future amendment and premium benefits clause provided that employer would continue to pay premiums until participant was no longer eligible for plan. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § *976 1001 et seq.

*978 Norman J. Baer, Minneapolis, MN, argued (Terrence M. Fruth and Paul M. Floyd, Minneapolis, MN, on the brief), for Appellant.

Richard A. Kaplan, Minneapolis, MN, argued (Madge S., Thorsen, Minneapolis, MN, and Matthew B. Newman, Edina, MN, on the brief), for Appellee.

Before McMILLIAN, JOHN R. GIBSON, and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

This ERISA welfare benefits case comes before us a second time, after a bench trial and a judgment in favor of Ceridian Corporation, the employer. Kent Barker, Carla McAndrews, and Martin Timmons, on behalf of themselves and a class of Ceridian employees who were disabled before January 1, 1991, sued to recover benefits under Ceridian's[1] long-term disability plan, specifically payment of their health, dental, and life insurance premiums. Before 1994, Ceridian had paid these premiums for employees on long-term disability, but effective January 1, 1994, Ceridian required the disabled employees to pay part of the costs for their insurance. The district court initially entered summary judgment for Ceridian, but we reversed for a trial on the issue of whether Ceridian

[1] Ceridian was formerly called Control Data Corporation, but we will use the current name Ceridian throughout this opinion.

had originally intended the right to payment of these premiums to vest once a participant became disabled. *Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997) *(Barker I)*. The district court tried the case and found that the class did not prove Ceridian had any such intent. The class appeals from the district court's ruling that Ceridian never intended to give disabled employees a vested right to payment of their insurance premiums. We reverse and remand.

Ceridian's long-term disability benefits consisted of two components, one of which was paid for by employee contributions and one of which was paid for by Ceridian. The income protection component guaranteed disabled employees income payments of 60% of their pre-disability salary; in order to make the income payments tax deductible, this benefit was funded by employee contributions. The other component was the payment of health, dental and life insurance premiums for disabled employees; this benefit was paid for by Ceridian, without employee contribution.

Although Ceridian had an informal practice of paying insurance premiums for disabled employees before 1976, this benefit first appeared in Ceridian's ERISA plans in 1977, when it was briefly mentioned in Ceridian's summary plan description for its disability plan. The 1978 disability plan summary was the first plan document that clearly described the benefit. The summary plan descriptions changed from year to year, but in *Barker I* we identified three critical clauses that recurred in the summary plan descriptions: the promise of the insurance premium benefit, the termination clause, and the reservation of rights. *See* 122 F. 3d at 630-31.

In *Barker I* we quoted the description of the insurance premium benefit from the 1986 summary plan description: "While on Long-Term Disability Status the company will pay

the premiums for all the company sponsored benefits (medical, life, and dental) for which you and your dependents were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans." *Id.* at 635. Similar language is found in the 1978, 1980, 1982, and 1985 summary plan descriptions and in the 1989 Employee Benefits Manual.

We also considered relevant the clause advising participants of their rights in the ***979** event the long-term disability plan terminated: "If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claims for such benefits will continue as long as you remain totally disabled as defined by the plan." *Id.* at 636.

In contrast to the premium benefits clause and the termination clause, which appear to promise benefits for the future, the reservation of rights clause reserves to Ceridian broad rights to amend the plan. The 1983 and 1986 summary plan descriptions stated: "[Ceridian] expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration." *Id.* at 635.

In *Barker I,* 122 F.3d at 638, we concluded that our case was governed by the reasoning of *Jensen v. SIPCO, Inc.,* 38 F.3d 945 (8th Cir.1994). In construing a reservation of rights clause in *Jensen,* we reasoned that we should interpret ERISA documents in accordance with the law of trusts. 38 F.3d at 950. Trusts law allows us to admit extrinsic evidence if the intent of the settlor cannot be ascertained by examination of the trust instrument itself (here, the formal ERISA plan and the summary plan descriptions). *Id.* We held in *Barker I* that the reservation of rights in this case, as in *Jensen,* 38 F.3d at

950, was ambiguous, since it was not clear whether the reservation of rights preserved the right to amend the plan only as to those who would become entitled to the benefits in the future, or also as to those already on disability. 122 F.3d at 638-39. The latter reading would render the premium benefit clause virtually nugatory: "Here, if Ceridian faced no limit on its ability to change the level of benefits paid to disabled employees the coverage could become all but nominal and make the promise of lifetime benefits illusory." *Id.* at 638. *Cf. American Fed'n of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 983 (2d Cir. 1997) (reserving question of "whether a specific promise of vested benefits can be defeated by a general reservation of the right to amend or terminate a plan").

In addition to the ambiguity of the reservation of rights, this case presented the additional factor of the termination clause language that seemed to grant a promise of future benefits. *Barker I*, 122 F.3d at 637-38. We held that applying the general reservation of rights clause to participants who were already disabled would render illusory the promise that disabled participants would continue to receive benefits in the event of the plan's termination. *Id.* at 638.

In light of these two sources of ambiguity, we remanded for the district court to take extrinsic evidence on the issue of whether Ceridian intended benefits to vest at the time of disability. *Id.* at 638.

At trial, the class presented several types of evidence relevant to whether Ceridian had intended the summary plan descriptions to convey a promise of future benefits and whether the reservation of rights was meant to apply to already disabled participants.

First, the class presented the testimony of plan participants, such as class representative Kent Barker, that they believed the reservation of rights would not apply to participants already on disability.

Second, and related, the class presented testimony that Ceridian's representatives had told participants they could not lose the premium benefits once they were disabled. One participant, Barbara Proehl, testified that a Ceridian personnel representative told her that the reservation of rights would not allow the company to change benefits once a participant was disabled. In the same vein, former Ceridian management, including James Morris, Ceridian's former Vice President of Compensation, testified not only that this was their understanding of the reservation of rights, but also that this was how they explained the plan to employees. Morris testified that he viewed the disability premium ***980** benefit as vested once a participant became disabled, and that he "definitely" used the word "vested" in describing this benefit to the people who worked for him.

Third, the class presented evidence that in 1991 Ceridian amended the premium benefit to require participants who would become disabled in the future to pay part of the cost of their insurance premiums, but that the change was not made applicable to those already on disability.

Finally, the class presented the testimony of Donald Shovein, the Ceridian Director of Employee Benefits from 1975-81, who was in charge of preparing Ceridian's employee welfare plans. Shovein drafted the 1977 summary plan description and oversaw the preparation of later summaries. Shovein testified:

Q: Based on your experience as a benefits manager in 1976 when you were forming this plan, did you have an understanding as to whether--once a person became disabled--the disability benefits could be changed or taken away?

A: My understanding was clearly that it could not.

Shovein testified that he tried to communicate this understanding to Ceridian's employees through "the various media or vehicles I mentioned earlier," referring to the summary plan descriptions. Shovein specifically addressed the reservation of rights clauses that he drafted for the summary plan descriptions. He intended that the reservation of rights would have no effect on those who were already disabled, and he tried to express that intent in the summary plan descriptions. Shovein presented the summaries to the Ceridian board of directors before they were distributed, and he testified he recalled no discussion at the board of directors level about the reservation of rights issue.

Ceridian's evidence consisted of the testimony of John Schmidtke, the lawyer who drafted Ceridian's formal long-term disability plan, and of Michael Kotten, who had served as Ceridian's plan administrator at the time Ceridian made the decision to require currently disabled employees to pay part of their own insurance premiums. Schmidtke's first involvement with the Ceridian long-term disability benefit plan came in 1980, when he drafted the formal plan. Schmidtke's practice was to ascertain Ceridian's intent by holding plan design meetings and telephone conversations, and then to send his drafts to his contact at Ceridian-usually Donald Shovein. Schmidtke testified, "It was a back and forth kind of thing until everyone was on the same page." Schmidtke did not include the insurance premium benefit in

the long-term disability plan, and indeed the formal plan does not include this benefit. He did, however, include a broad reservation of rights which differed from the sort of clause that he included in pension plans, which provided a vested benefit. In pension plans, the reservation of rights would include a proviso such as, "Providing, however, that no amendment can retroactively affect the accrued benefit." The formal long-term disability plan's reservation has no such proviso recognizing the existence of vested rights under the plan.

In addition to his testimony about the reservation of rights in the formal plan, Schmidtke also testified about the function of the termination clause promising that, in the event of termination, participants already on disability would continue to receive benefits. Schmidtke explained that the disability income replacement benefit was funded by employee contributions, so that when a disabled employee received the payments, they would be tax deductible. Once Ceridian collected employee contributions, they were kept in a long-term disability trust. The termination clause provided that if the plan terminated the trust would continue to pay benefits until the funds in the trust were depleted. The premium benefit, on the other hand, was paid for by Ceridian, not out of the long-term disability trust. Schmidtke testified: Q: "Does this provision [termination clause in formal plan] as you understand it have any application whatsoever to the premium benefit?" A: "No."

***981** Kotten testified that as plan administrator in the early 1990s, he had interpreted the plan documents to permit Ceridian to amend the premium benefit provided to participants already out on disability. Kotten had nothing to do with drafting the plan documents, having first assumed

responsibility for employee benefits on a corporatewide basis in October 1989.

In its ruling, the district court focused on the function of the termination clause. The court credited Schmidtke's explanation, finding. "[T]he language of the termination clause was never intended to apply to the premium payment benefit but was meant only to apply to the long-term income protection portion of the disability benefits." The court rejected the relevance of Barker's testimony about his understanding of the plan documents, because the premium benefit had evolved at a time when Barker was not employed at Ceridian. The court did not directly address the probative value of the testimony by Ceridian management that they meant to provide vested benefits that were not subject to the reservation of rights; testimony that Ceridian personnel administrators informed participants that the premium benefit could not be amended after they were out on disability; and the evidence that the amendment to the premium benefit in 1991 was made applicable only to those who would become disabled in the future. Instead, the court made only the following general findings:

> No evidence was adduced to support plaintiffs' claim that, because disabled persons were "out on claim," the premium payment benefit could not be changed. That benefit was not dependent on an ongoing status, such as disability, and therefore, the "out on claim" concept had no application to the payment of the premium benefit.
>
> All witnesses agreed that companies that provide welfare payment benefits must have the flexibility to change them in the face of changing economic circumstances. The court finds that Ceridian made its change to the premium payment welfare benefit based on a careful consideration of the

economic factors and it was Ceridian's intent to retain the power to make the change which is the subject of this action.

[1] [2] This case hinged on the meaning of ambiguous instruments, which the court was to ascertain by examining extrinsic evidence of the settlor's intent. *Barker I,* 122 F.3d at 638. The district court's determination of the settlor's intent in executing an ambiguous instrument is a question of fact, reviewable only for clear error. *See Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 731 (8th Cir.1995), *cert. denied,* 516 U.S. 1174, 116 S.Ct. 1268, 134 L.Ed.2d 215 (1996) *Mohamed v. UNUM Life Ins. Co.*, 129 F.3d 478, 480 (8th Cir.1997) (citing Minnesota law); 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 2.23 (2d ed. 1992). A finding that is contrary to the only testimony presented on a question may properly be considered clearly erroneous. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2d Cir.1991).

[3] The class contends that the district court failed to comply with our instruction in *Barker I to* examine extrinsic evidence to determine Ceridian's intent in promulgating the plan documents. Ceridian responds that the district court examined extrinsic evidence concerning the purpose of the termination clause. According to Ceridian, once the court found that the termination clause's assurance of continued coverage after disability did not apply to the premium benefit, that finding disposed of the entire case: "[T]he district court's findings that the termination clause provided plaintiffs no support on the merits were dispositive, since there was no other basis in any of the language of the plan on which to find vesting."

Ceridian is clearly correct that the district court found the termination clause did not apply to the premium benefit and

so could not provide a vested right to the premium benefit. However, eliminating the termination clause does not resolve the entire case. We based our opinion in ***982** *Barker I* on the ambiguity of the reservation of rights clause as well as the termination clause. We held that the reservation of rights clauses in this case were "materially indistinguishable" from those held ambiguous in *Jensen* (in which there was no comparable termination of plan clause). *Barker I*, 122 F.3d at 635. The district court's opinion focused on the termination clause, but ignored the other abundant evidence that Ceridian did not intend the premium benefit to be amendable with respect to a participant who was already disabled.

The district court did not directly address the question of whether Ceridian intended that reservation of rights to apply to those already on disability, except to say that "no evidence was adduced" to support the class's interpretation. This statement cannot be squared with a record replete with testimony of Shovein, who drafted the language in issue, that he had intended the reservation of rights in the summary plan descriptions to apply only to those who would become disabled in the future, not those already on disability. This evidence had direct and vital relevance to the issue of whether Ceridian intended benefits to vest upon disability.

[4] [5] Furthermore, there was abundant evidence that Ceridian's employee benefits representatives interpreted the reservation of rights as applicable only to those not already on disability. Barbara Proehl testified that she specifically asked a personnel representative about the meaning of the reservation of rights and was told that it would not allow the company to change benefits once a participant was disabled. James Morris, Ceridian's Vice President of Compensation at the relevant time, testified that this was his understanding of the meaning of the language and this was how he explained

the plan to his employees. Informal statements by an employer's representatives about benefits do not legally alter an ERISA plan, which is required by statute to be written. *Jensen*, 38 F.3d at 949. "ERISA precludes oral or informal amendments to a plan, by estoppel or otherwise." *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 885 (8th Cir.1999) (quoting *Houghton v. SIPCO*, 38 F.3d 953, 958 (8th Cir.1994)). However, in a case involving ambiguous written instruments, the contemporaneous interpretation of the instrument by the employer is relevant evidence as to the settlor's intent. *Fink v. Union Cent. Life Ins. Co.*, 94 F.3d 489, 492 (8th Cir.1996) *see Jensen*, 38 F.3d at 951. Again, the district court's statement that there was "no evidence" supporting the class's interpretation of the plan convinces us that the district court did not recognize the significance of the evidence before it.

[6] Evidence that an employer has in the past limited plan changes to those who were not yet in claim status is sometimes relevant, *see Jensen*, 38 F.3d at 951, and sometimes not, *see Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir.1990), depending on the surrounding circumstances. At the least, Ceridian's 1991 amendment to the premium benefit, which affected only participants who were not already on disability, is consistent with the testimony of the executives who said they understood that changes could only affect future disability claimants, not those already on disability at the time of the change.

Ceridian argues that we should assume that the district court made credibility determinations rejecting the class's evidence. There are several reasons why we cannot do so. First, the district court's opinion was not a highly condensed ruling in which all issues were treated summarily. The district court explicitly rejected the relevance of Kent Barker's testimony,

explaining that Barker was not at Ceridian during the relevant times and therefore had no knowledge of Ceridian's intent in promulgating the summary plans. The district court was unlikely to go into this level of detail regarding one of the class's witnesses and then reject without comment the crucial testimony of Shovein, Proehl and Morris if the court recognized the relevance of those witnesses' testimony. ***983** Second, the district court stated that there was "no evidence" to support the class's interpretation, which is quite different from rejecting relevant evidence as not credible. Finally, the class's evidence concerning Ceridian's intent in publishing the summary plan descriptions beginning in 1978 is the *only extrinsic evidence* offered on the meaning of the summary plan descriptions generally or the reservation of rights in those descriptions specifically. Ceridian offered the testimony of John Schmidtke, the scrivener of the formal plan, who did not recall discussing with anyone from Ceridian "what was intended about the reservation of rights clause." Schmidtke did not become involved with the long-term disability plan until 1980, and then he only drafted the formal plan, not the summary plan which is the source of the rights on which the class relies. Schmidtke did not recall seeing the summary plan descriptions at the time they were created. Therefore, his testimony does not conflict with Shovein's testimony about the meaning of the summary plan description drafted in 1978, as Ceridian contends, and the district court could not have relied on Schmidtke in rejecting Shovein's testimony.

[7] Ceridian argues that the class cannot rely on the summary plan descriptions because they instructed the reader to consult the formal plan in the event of uncertainty about meaning. Ceridian contends that the formal plan made the reservation of rights applicable to "all Participants," and therefore the reservation clearly applies to currently disabled participants. Where the formal plan and the summary plan

description conflict, the employer is bound by the provisions of the summary plan description. *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620-21 (8th Cir. 1998) (summary plan prevailed even where the summary referred the reader to the formal plan for "[c]omplete details"); *Barker I*, 122 F.3d at 633. This rule is particularly well-founded in a case such as this one, where the formal plan was not routinely distributed to employees, but only made available upon request. Donald Shovein testified that he remembered "a time or two" when employees asked for the formal plan, but it happened "very very infrequently." The class's evidence showed the summary plan's reservation of rights did not apply to currently disabled participants. Accordingly, even if the formal plan were drafted with a contrary intent, we would have to give precedence to the summary plan descriptions.

[8] [9] In sum, *Barker I* identified the reservation of rights in the summary plan descriptions as a source of ambiguity. 122 F.3d at 638. Ceridian did not present testimony of persons having knowledge of Ceridian's intent in drafting the summary plan descriptions' reservations of rights. The class presented the testimony of the drafter, Donald Shovein, that the reservation of rights was meant to apply only to those participants who were not on disability at the time of any future amendment. Ceridian's decision to make the 1991 amendment applicable only to those not already on disability corroborates this testimony. The class also presented testimony from others, including James Morris and Barbara Proehl, that Ceridian so interpreted the reservation of rights at the time it promulgated the summary plan descriptions. The district court's complete disregard of the only relevant testimony explaining Ceridian's intent regarding the

reservations of rights in the summary plan descriptions makes the court's findings clearly erroneous.[2]

We therefore must reverse and remand for entry of judgment in favor of the class. However, we decline to consider the question of appropriate relief because the district court has not reached that issue. ***984.** Accordingly, we remand for further proceedings consistent with this opinion.

[2] The class argues that the district court's findings regarding the termination clause were based on evidence lacking a foundation. However, the class repeatedly asserts that the termination clause is not the source of ambiguity in the plan documents. Therefore, we need not scrutinize a finding which is irrelevant to the class's theory of recovery.

From: Eighth Circuit Clerk ff11 [+1 (314) 5393600] on behalf of ksmith@ck8.uscourts.gov

Sent: Friday, December 10, 1999 16:12:57
To: '8-612-349-6416'
Subject: 99-1434:kas510429P2-8:0

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

99-1434MNMI

Kent P. Barker, Carla J. McAndrews, Martin J. Timmons, on behalf of themselves and all others similarly situated,	x x x x x x x	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellants,	x	
v.	x	
Ceridian Corporation, a Delaware Corporation, individually and as succcessor in interest to Control Data Corporation,	x x x x x x	
Appellee.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 10, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Court File No. 4-94-944 DSD/JMM

Kent P. Barker, Carla J. McAndrews and Martin J. Timmons, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

Ceridian Corporation, a Delaware corporation, individually and as successor in interest to Control Data Corporation,

Defendant.

Terence M. Fruth, Esq., Norman J. Baer, Esq. and Fruth Anthony, 3750 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; Matthew B. Newman, Esq. and Newman Law Office, 7101 York Avenue South, Suite 158, Edina, MN 55435 and Paul M. Floyd, Esq. and Rau & Floyd, 527 Marquette Avenue, Suite 927, Minneapolis, MN 55402, counsel for plaintiffs.

Madge S. Thorsen, Esq., Richard A. Kaplan, Esq. and Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, counsel for defendant.

This matter came before the court for trial on September 1, 1998. The court heard evidence, received exhibits and heard arguments of counsel. Based upon those proceedings, the file, the remand order of the United States Court of Appeals for the Eighth Circuit, Barker v. Ceridian Corp., 122 F. 3d 628 (8th Cir. 1997) and the papers filed by the parties, the court hereby issues its:

FINDINGS OF FACT

1. This case is brought by a class of employees against Ceridian Corporation (hereinafter "Ceridian"), the successor to Control Data Corporation, (hereinafter "Control Data"), because Ceridian required those employees to share in the costs of insurance premiums for health, dental and life insurance coverage effective January 1, 1994.

2. The class was certified based on a stipulation of counsel as follows:

> All employees of Ceridian Corporation, formerly known as Control Data Corporation, who were disabled prior to January 1, 1991 and who were having 100% of their health, life and dental insurance premiums paid by Ceridian on or before December 31, 1993, excluding those individuals who are members of the class which was certified in the class action lawsuit venued in the United States District Court for the Western District of Oklahoma entitled Leo W. Chiles, et al. v. Ceridian Corporation, et al. (Court File No. Civ- 93-1715-D).

3. Both parties brought cross-motions for summary judgment, and based on the facts then before the court, summary judgment was rendered on behalf of Ceridian. The

issue decided in those motions was whether Ceridian had sufficiently reserved its legal right to make changes to the benefits provided employees that had become disabled prior to 1991.

4. The circuit court reversed and remanded to this court stating:

> The evidence offered by the employees here is more than enough to show that a genuine issue of material fact exists concerning whether Ceridian could change its long-term disability plan retroactively and refuse to pay the insurance premiums for the disabled employees.

5. In reaching its decision, the circuit court believed that the reservation of rights clause read with language from the Disability Summary Plan Description ("SPD") relating to termination of the Long-Term Disability Plan created an ambiguity. Because it determined that there was an ambiguity, the circuit court looked to extrinsic evidence and found that the evidence presented by the affidavit of Barker was sufficient to create a genuine issue of material fact.

6. At trial Barker testified substantially in conformance with the affidavit submitted to the Eighth Circuit Court of Appeals with some significant differences. He testified that he had worked for Ceridian, or its predecessor, from 1968 through 1975 and then returned in 1986. He indicated that while he was initially employed the welfare premium payment benefit did not exist, and when he was reemployed in 1986, it did. Thus, he could shed no light on the reasons for the change or the intent of any of the participants in the change incorporating the premium payment benefit. He testified that he did not know if the plan applied to those already disabled when it was adopted and frankly had never heard anyone say that it was a "vested" benefit. He also testified that he had not

recommended that the benefit be vested when in a position to do so and before he became disabled himself. Further, Barker testified that he knew of no statement or other evidence that would prevent the application of the reservation of rights clause to the premium payment benefit.

7. All of the testimony heard at trial and all of the exhibits received in evidence show that there was no intent on the part of Control Data or Ceridian to create a vested welfare benefit in the form of the premium payments for disabled employees. Further, none of the documents that control the decision, such as the summary plan descriptions ("SPDs") specifically state, or in any other way imply, that the members of the class are exempt from changes to the welfare plan.

8. The testimony of witnesses called by both parties, and the exhibits received, made it clear that the language of the termination clause was never intended to apply to the premium payment benefit but was meant only to apply to the long-term income protection portion or the disability benefits. The clause quoted by the circuit court, and relied on by the parties, states:

> If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claims for such benefits will continue as long as you remain totally disabled as defined by the Plan.

Here, in addition to the fact agreed to by the parties that no termination had occurred, thus making the clause inapplicable on its face, the evidence shows that the termination clause was not meant to and did not act to vest the premium payment benefit.

9. An examination of the relevant documents from 1977 through 1990 shows that the termination clause appearing in those documents was not meant to, nor did it,

nullify the reservation of rights clause which also appears in the documents. An historical analysis shows:

A. In 1977 Control Data provided an income benefit to disabled employees using a group disability policy of insurance. At that time there was no provision for premium payments either in the policy or otherwise. Further, the language of the policy contained virtually the same termination clause that has followed the income benefit through all the documents. The termination clause in the 1977 policy obviously applies only to the income benefit. In the 1977 document there was no discussion of vesting and the typical reservation of rights clause did appear.

B. A new disability SPD became effective on January 1, 1978. In addition, the group disability insurance policy which provided the income benefit was in force with the same language that was previously discussed. For the first time, language implying a premium benefit was contained in the SPD. The 1978 disability SPD contained a termination clause that referred to the insurance policy and did not refer to other benefits, such as the premium benefit, where it stated:

> If the group Long-Term Disability policy terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim of such benefits will continue.

The testimony of the various witnesses supported the fact that this termination clause related only to the insurance policy and did not relate to any other benefit and provided no support for vesting the

premium benefit. In addition, the reservation of rights clause in the 1978 disability SPD is the same clause that had appeared in 1977.

C. A self-insured disability income protection plan was adopted by Ceridian in 1980 and was memorialized a formal Long-Term Disability Plan. The LTD plan refers only to the income benefit.

In 1980 a new SPD was issued which related primarily to the income benefit but, for the first time, spelled out the premium benefit in specific terms. Significantly, the SPD indicated that dependents of then disabled employees would begin to receive coverage on January 1, 1980, for the first time. This provided evidence that Control Data believed that it could change the premium benefit of those persons already on disability. Testimony of witnesses concerning the effect of the reservation of rights clause as related to the 1980 SPD and Plan strongly indicated that Control Data had reserved the right to require disabled persons to share the cost of any benefits that were not vested. The termination clause did not modify or affect that right.

D. In 1982 and 1986, SPDs were issued which made no material change to the language discussed above except that it was made clear that anyone on Medical Leave Status, which included Short-Term Disability Status and Long-Term Disability Status, did receive the premium benefit.

E. There was no change to the Plan documents in 1989, however Ceridian combined all of the SPDs in a single Employee Benefits Manual. Inasmuch as no termination clause was included in the section of the manual discussing benefits available to disabled employees, an inference can be made that the

termination clause was unimportant as it affected those benefits.

F. After a careful review of the Plan documents, Ceridian decided to require those persons on disability leave to share the costs of their welfare benefits effective January 1, 1994. This decision did not require retroactive application inasmuch as it did not require the plaintiffs to reimburse Ceridian for premium benefits already paid out, but only required them to help pay those premium benefits from January 1, 1994 onward.

10. The attorney for Ceridian that created the Plan testified that the termination clause was placed in the LTD Plan because there was a potential of having funds remaining after the Plan was terminated and a specific statutory provision of Minn. Stat. § 62A.24 requires that a termination clause be present in a group disability income insurance policies. He further testified that, because the premium benefit was not funded thorough the disability income benefit trust, the termination clause had no application to that benefit, and was neither intended to modify nor negated the reservation of rights clause.

11. All of the testimony and documents received support the conclusion that the termination clause relates solely to the income benefit and not the premium payment benefit and was not relied upon by anyone, including plaintiffs, representatives and witnesses, to support the concept of vesting or to modify in any way the reservation of rights clause as it relates to the premium payment benefit.

12. No evidence was adduced to support plaintiffs' claim that, because disabled persons were "out on claim", the premium payment benefit could not be changed. That benefit was not dependent on an ongoing status, such as disability, and therefore, the "out on claim" concept had no application to the payment of the premium benefit.

13. All witnesses agreed that companies that provide welfare payment benefits must have the flexibility to change them in the face of changing economic circumstances. The court finds that Ceridian made its change to the premium payment welfare benefit based on a careful consideration of the economic factors and it was Ceridian's intent to retain the power to make the change which is the subject of this action.

CONCLUSIONS OF LAW

The law as stated by the Eighth Circuit Court of Appeals controls the decision in this case. As that court in its remanding opinion stated:

> ERISA distinguishes between two kinds of employment benefits--welfare benefits and pension benefits. See 29 U.S.C. § 1002(l)-(2) (1994). The employees concede that the plans at issue before us are employee welfare benefit plans. Though pension plans are subject to mandatory vesting requirements see 29 U.S.C. § 1053 (1994), welfare plans are not subject to such standards, and employers generally are free to amend or terminate these plans unilaterally. See Curtiss-Wright Co. v. Schoonejongen, 514 U.S. 73, 78 (1995); Jensen v. SIPCO, Inc, 38 F.3d 945, 949 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995). However, the simple fact that ERISA does not require vesting of welfare benefit plans does not mean that a welfare benefit plan will never vest. An employer and employee may contract for post-employment welfare benefits that vest. See In Re White Farm Equip. Co., 788 F.2d 1186, 1193 (6th Cir. 1986).
>
> ERISA requires that employee benefit plans be established by a written instrument. See 29 U.S.C. §

1102(a)(1). Therefore, any promise to provide vested benefits must be "incorporated, in some fashion, into the formal written ERISA plan." Jensen, 38 F.3d at 949(quotation omitted). Summary plan descriptions are considered part of ERISA plan documents. See id. Adequate disclosure to employees is one of ERISA's major purposes. See id. at 952. Because of the importance of disclosure, in the event of a conflict between formal plan provisions and summary plan provisions the summary plan description provisions prevail. See id.

When interpreting ERISA plan documents, we look to the law of trusts: "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissable.'" Id. at 950 (quoting Bruch, 489 U.S. at 112). In determining if other evidence is admissible we look to the language of the plan provision at issue and consider whether the provision is ambiguous:

> that intent [of the settlor] is first sought by careful examination of the trust clause in question, giving the words in that clause their ordinary meanings. If the construction question cannot be resolved by reference to the clause alone, the court will examine the entire trust instrument to determine the creator's intent and purposes .... [T]he third step becomes necessary when the intent or meaning of the settlor.... cannot be determined by reference to the provisions of the trust instrument itself. Extrinsic

> evidence will be admitted by the court to assist it in determining the meaning and effect of the particular clause.

Id. (quotation omitted).

Barker v. Ceridian Corp., 122 F.3d 618, 632-33 (8th Cir. 1997).

. . .

> Because welfare benefits do not statutorily vest under ERISA, the employees carry the burden of showing an agreement or other demonstration of employer intent to vest benefits. See Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994).
>
> In support of their argument the employees cite Local Union No. 150-A United Food & Commercial Workers International Union v. Dubuque Packing Co., 756 F.2d 66 (8th Cir. 1985). They argue that this case provides that benefits are vested when receipt of benefits depends on an employee's status. In Dubuque Packing, the court first looked at the language in the plan documents and determined that the language was ambiguous. After examining the extrinsic evidence, the court concluded that the plaintiffs had proved that the parties intended the benefits to vest when the parties retired. Id. at 70. Dubuque Packing thus stands for the proposition that parties can intend to provide vested benefits. We therefore look to see whether there was an intent to provide vested benefits in this case. Because welfare benefits do not automatically vest as a matter of law, the issue is "simply one of contract interpretation," Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1516(8th Cir. 1988), cert. denied, 489 U.S.

1051(1989), which is a question of law. See Dubuque Packing, 756 F.2d at 69. Where a contract is ambiguous, a court may weigh extrinsic evidence to assist in construing the language. See id.

The language of the 1986 disability income protection summary plan description provides: "While on Long-Term Disability Status the company will pay the premiums for all the company-sponsored benefits (medical, life, and dental) for which you and your dependants were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans." The language of the 1983 summary plan description and the 1985 formal plan make the same promise. The 1983 and 1986 disability summary plan descriptions, however, state: "[Ceridian] expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration." The 1989 disability summary plan description contains a similar reservation of rights provision.

In short, we are faced with a clause that provides that Ceridian will pay insurance premiums until an employee is no longer disabled or no longer eligible for the plan and a reservation of rights clause that allows Ceridian to change or discontinue the plan. The conflict between these clauses brings us face to face with difficult contract interpretation questions. Several courts have considered similarly conflicting clauses and have not answered this puzzling question uniformly. See, e.g., Diehl v. Twin Disc, Inc., 102 F.3d 301, 306-09 (7th Cir. 1996); Chiles, 95 F.3d at 1511-14; In re Unisys Corp. Retiree Med. Benefit

ERISA Litig., 58 F.3d 896, 902-905 (3rd Cir. 1995); Gable v. Sweetheart Cup Co. Inc., 35 F.3d 851, 855-58 (4th Cir. 1994), cert. denied, 514 U.S. 1057 (1995); Bidlack v. Wheelabrator Corp., 993 F.2d 603, 605-10 (7th Cir.), cert. denied, 510 U.S. 909 (1993) This court recently has addressed this question in Jensen.

In Jensen, a class of retired employees brought suit against SIPCO, their employer, after SIPCO changed its medical benefit plan for retirees. The plan at issue provided that SIPCO would pay medical benefits until a retiree died, or a spouse divorced, or a child married or reached age nineteen. 38 F.3d at 950. Observing that this promise was "at most an ambiguous expression of an intent to vest retiree benefits,' id. we then considered the plan's reservation of rights clauses, which provided, "[T]he Company shall have the right and power to alter, amend, or annul any of the provisions of this ... Plan.... Unless otherwise expressly provided therein, amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment." Id. at 948-49. Focusing on the language which allowed SIPCO to amend or terminate "any of the provisions of th[e] ... Plan," we held that the reservation of rights provisions at issue were not free from ambiguity. Id. at 950. We observed that "the question at this stage of the analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence." Id. We held that the reservation of rights clauses were "not facially unambiguous-they leave at least some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already

> retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired." Id. Because of the ambiguity in the plan, we held that the district court properly considered the extrinsic evidence. Id.
>
> The reservation of rights clauses in Jensen and in the plans before us today are materially indistinguishable. Both plans provided a welfare benefit until a person was no longer eligible for the plan, yet retained the right to amend or terminate the plan. Jensen thus controls our analysis, and we hold that Ceridian's plans are ambiguous concerning whether Ceridian can retroactively change benefits to disabled employees. See also American Fed'n of Grain Millers v. International Multifoods Corp., 116 F.3d 976, 980 (2d Cir. 1997) (to reach a trier of fact it is enough to point to written language that could be interpreted as a promise to vest the recipient's benefits).

Barker, 634-35.

Based on the evidence received and the testimony of all the witnesses, the ambiguity created by the reservation of rights clause when considered in light of the various termination clauses is resolved against the plaintiffs and in favor of Ceridian. A reasonable contract interpretation based on all the extrinsic evidence received leads to this conclusion. The court also concludes, and finds, that the premium benefit was a welfare plan rather than a pension plan and could be amended at will by Ceridian. No agreement was shown to exist between the company and the employees to vest the premium benefit. Further, no written instrument incorporated by specific words or implication of a vesting of the premium benefit. Thus, Ceridian did maintain its legal right to change the premium payment benefit provided to employees that had

become disabled prior to 1991 and when it did so, it acted correctly and lawfully.

ORDER FOR JUDGMENT

Judgment shall be entered on behalf of Ceridian and against plaintiffs.

Dated: January 4, 1999

/s/
David S. Doty, Judge
United States District Court

Kent P. BARKER, Carla J. McAndrews, and Martin J. Timmons, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,

v.

CERIDIAN CORPORATION, a Delaware Corporation, Individually and as Successor in Interest to Control Data Corporation, and Control Data Systems, Inc., a Delaware Corporation, Individually and as Successor in Interest to Control Data Corporation, Defendants.

Civil No. 4-94-944.

United States District Court,
D. Minnesota,
Fourth Division.

March 26, 1996.

Employees receiving disability benefits under employer's long-term disability plan brought class action suit under Employee Retirement Income and Security Act (ERISA), after employer ceased paying class members' premiums for life, health and dental benefits in which they were enrolled at time of disability. On cross-motions for summary judgment, the District Court, Doty, J., held that: (1) employer's "disability program," promising to pay premiums relating to disabled employees' other benefit plans enrollment, was not informal welfare benefit plan under ERISA; (2) formal plans did not provide employees with vested right to company-paid premiums; (3) employees could not maintain claim of breach of unilateral contract under federal common law; (4)

employees failed to support estoppel claim under federal common law, and state law estoppel claim was preempted; (5) employer did not breach fiduciary duties; and (6) employer did not interfere with employees' protected rights under ERISA.

Defendants' motion granted.

1. PENSIONS 28

296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k27 Validity of Plan; Statutory Regulation
296k28 Plans subject to regulation.

D.Minn. 1996.

Employer's "disability program," promising to pay premiums relating to disabled employees' other benefit plans enrollment while employees were receiving benefits under long-term disability plan, was not informal welfare benefit plan covered under ERISA; "disability program" was contained only in summary plan descriptions (SPD) distributed by employer, those documents met ERISA standards for SPDs, and, as SPDs were part of ERISA plan documents, they could not constitute informal plan. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B).

2. PENSIONS 131

296 ----
296II Employee Pension and Benefit Plans
296II(G) Amount of Benefit
296k131 In general.

D.Minn. 1996.

Determination of benefits provided by ERISA plan, whether they vest or whether they are terminable or amendable, is simply matter of contract interpretation. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

3. PENSIONS 24.1

296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k24.1 In general.

D.Minn. 1996.

Summary plan descriptions (SPD) are part of ERISA plan documents. Employee Retirement Income Security Act of 1974, § 402(a)(1), 29 U.S.C.A. § 1102(a)(1).

4. PENSIONS 26

296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.

D. Minn. 1996.

In interpreting ERISA plan documents, court applies law of trusts. Employee Retirement Income Security Act of 1974, §§ 402(a)(1), 502, 29 U.S.C.A. §§ 1102(a)(1), 1132.

5. PENSIONS 62

296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.

D.Minn. 1996.

Vesting of welfare benefits is not presumed, but rather plan documents must show specific expression of employer's intent to be bound. Employee Retirement Income Security Act of 1974, § 201(1), 29 U.S.C.A. § 1051(1).

6. PENSIONS 141

296 ----
296II Employee Pension and Benefit Plans
296II(K) Actions to Recover Benefits
296k141 Evidence and fact questions.

D.Minn. 1996.

Burden is on beneficiaries seeking employee welfare benefits to prove fixed entitlement. Employee Retirement Income Security Act of 1974, § 201(1), 29 U.S.C.A. § 1051(1).

7. PENSIONS 62

296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.

D.Minn. 1996.

Employer's long-term disability and other welfare benefit plans lacked specific expression of intent to provide vested right in company paid premiums for health, life and dental insurance benefits while employees were receiving long-term disability benefits, and thus employer's termination of that benefit did not violate ERISA; language of plans and summary plan descriptions (SPD), stating that employer would pay monthly contributions for other benefits until qualified employee was "no longer considered disabled" or

until employee or dependents became ineligible for benefits, indicated only what plan provided, not whether provisions of plan would be provided in perpetuity, and plans contained reservation of rights clause. Employee Retirement Income Security Act of 1974, §§ 201(1), 502(a)(1)(B), 29 U.S.C.A. § § 1051(1), 1132(a)(1)(B).

8. PENSIONS 65

296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k65 Amendment of plan.

[See headnote text below]

8. PENSIONS 66.1

296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k66 Termination or Transfer
296k66.1 In general.

D.Minn. 1996.

Unless plan documents provide otherwise, employer may amend or terminate welfare benefits without need to reserve such right. Employee Retirement Income Security Act of 1974, § 201(1), 29 U.S.C.A. § 1051(1).

9. PENSIONS 26

296 ----
29611 Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.

D.Minn. 1996.

Reservation of rights provision which reflects employer's right to change or terminate welfare plan is inconsistent with, and can defeat, claim for vested benefits. Employee Retirement Income Security Act of 1974, § 201(1), 29 U.S.C.A. § 1051(1).

10. PENSIONS 139

296 ----
296II Employee Pension and Benefit Plans
296II(K) Actions to Recover Benefits
296k139 In general.

D.Minn. 1996.

In seeking to require employer to pay health insurance and other premiums while they were receiving disability benefits under long term disability plan, employees could not maintain claim of breach of unilateral contract under federal common law, based on contention that employer offered to pay employees' premiums in event of disability, and that offer was accepted and supported by consideration in form of employees' continued employment until disability; even if such contract did not run afoul of ERISA's prohibition against informal amendments, argument was without merit. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

11. PENSIONS 139

296 ----
296II Employee Pension and Benefit Plans
296II(K) Actions to Recover Benefits
296k139 In general.

D.Minn. 1996.

In seeking to require employer to pay health ***1298** insurance and other premiums, employees receiving disability benefits under employer's long term disability plan could not maintain claim of promissory estoppel under federal common law, since employer's "promise to pay premiums" were unambiguous in not providing promise of vested benefits, and, even if plan terms were ambiguous as to vesting, there was no evidence that employer made any oral interpretations concerning plan provisions. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

12. PENSIONS 130

296 ----
296II Employee Pension and Benefit Plans
296II(F) Eligibility
296k130 Estoppel to deny eligibility.

D.Minn. 1996.

Plaintiffs may assert claim of estoppel where terms of ERISA plan are ambiguous and communications which form basis of estoppel claim constitute interpretation of that ambiguity. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

13. STOPPEL 52(1)

156 ----
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(1) In general.

[See headnote text below]

13. STATES 18.51

360 ----

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.51 Pensions and benefits.

D.Minn. 1996.

In seeking to require employer to continue to pay health insurance and other premiums, employees' equitable estoppel claim under state law was preempted by ERISA. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

14. PENSIONS 86

296 ----
296II Employee Pension and Benefit Plans
296II(D) Governmental Supervision
296k83 Judicial Supervision and Review
296k86 Evidence.

D.Minn. 1996.

Employees failed to establish that employer breached its fiduciary duty under ERISA after it ceased paying health and other insurance premiums of employees receiving disability benefits under long term disability plan, based on allegations that employer misrepresented or omitted material information and made material and substantial changes to disability program without adequately informing affected employees of existence or effect of change; employer did not act as fiduciary when it exercised its right to amend or terminate welfare benefits at issue, failure to disclose that welfare benefits did not vest was not breach of fiduciary's duty under ERISA, and employees came forward with no material misrepresentations in support of fiduciary duty claim. Employee Retirement Income Security Act of 1974, §§ 3(21),

404(a)(1), 502(a)(3)(B), 29 U.S.C.A. §§ 1002(21), 1104(a)(1), 1132(a)(3)(B).

15. PENSIONS 43.1

296 ----
296II Employee Pension and Benefit Plans
296II(B) Administration
296k43 Fiduciary Duties; Conflicts of Interest
296k43.1 In general.

D.Minn. 1996.

Failure to disclose that welfare benefits do not vest is not breach of fiduciary's duty under ERISA. Employee Retirement Income Security Act of 1974, § 404(a)(1), 29 U.S.C.A. § 1104(a)(1).

16.PENSIONS 138

296 ----
296II Employee Pension and Benefit Plans
296II(J) Payment and Assignment of Payment
296k138 In general.

D.Minn. 1996.

Employer did not interfere with employees' protected rights under ERISA when it ceased paying health and other insurance premiums of employees receiving disability benefits under employer's long term disability plan, since company was entitled to alter terms of its welfare benefit packages, and employees' benefits did not vest, so that amendment of those plans, and modification of employees' benefits, could not support ERISA discrimination claim. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C.A. § 1140.

***1300** Terence Melling Fruth, Paul Michael Floyd, F.D. Chip Baltimore, II, Fruth & Anthony, Minneapolis, MN.

Matthew B. Newman, Newman Law Office, Edina, MN, for plaintiffs Kent P. Barker, Carla J. McAndrews, Martin J. Timmons.

Madge S. Thorsen, Richard Alvin Kaplan, Elizabeth A. Di Cola, Popham Haik Schnobrich & Kaufman, Minneapolis, MN, for defendant Ceridian Corporation.

Thomas S. Fraser, Cynthia A. Jokela, Fredrikson & Byron, Minneapolis, MN, for defendant Control Data Systems, Inc.

***1301 ORDER**

DOTY, District Judge.

This matter is before the court on defendants' motion for summary judgment and on plaintiffs' motion for partial summary judgment. Based on a review of the file, record and proceedings herein, and for the reasons stated, the court grants defendants' motion for summary judgment and denies plaintiffs' motion for summary judgment.

BACKGROUND

Plaintiffs Kent P. Barker ("Barker"), Carla J. McAndrews ("McAndrews") and Martin J. Timmons ("Timmons") are representatives of a class of disabled employees of defendant Ceridian Corporation, f/k/a Control Data Corporation ("Control Data"). By order dated October 20, 1995, the court certified a class defined as followed:

All employees of Ceridian Corporation, formerly known as Control Data Corporation, who were disabled prior to January 1, 1991 and who were having 100% of their health, life and dental insurance premiums paid by Ceridian on or

before December 31, 1993, excluding those individuals who are members of the class which was certified in the class action lawsuit venued in the United States District Court for the Western District of Oklahoma entitled *Leo W. Chiles, et. al. v. Ceridian Corporation, et. al.*, (Court File No. Civ. 93-1715-D).

The court also certified a subclass of disabled employees, represented by Timmons, defined as "All employees of Ceridian Corporation, formerly known as Control Data Corporation, who were disabled on or after January 1, 1989 and prior to January 1, 1991." Each class member is disabled as that term is defined in the Long-Term Disability Plan of Control Data and receives a disability benefit of 60 percent of his or her previous full-time monthly compensation. Each class member was disabled prior to January 1, 1991, and up until December 31, 1993, Control Data paid each class members' premiums for their life, health and dental benefits in which they were enrolled at the time of disability. Effective January 1, 1994, Control Data stopped paying the full premiums for these disabled employees, instead the employees were required to pay part of the premiums if they wished to continue participation in their health, life and dental plans. Because of the financial hardships this action imposed, many disabled employees discontinued their participation in these welfare plans.

Plaintiffs allege that the decision of Control Data to stop paying such premiums violates the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et. seq.* Specifically, plaintiffs contend that their right to received this benefit vested when they attained Long-Term Disability Status or, for employees disabled between 1989 and 1991, Medical Leave Status and that Control Data did not effectively reserve the right to terminate its agreement to pay

such premiums. Plaintiffs' complaint has ten counts. At oral argument, plaintiffs voluntarily moved to dismiss Counts IV (breach of contract under state law) and X (improper amendment). These counts shall be dismissed. Defendants move for summary judgment on all remaining counts.

DISCUSSION

The court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). This standard mirrors the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which requires the trial court to enter judgment as a matter of law if there can be but one reasonable conclusion as to the verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249, 106 S. Ct. at 2510.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its favor. *Id.* at 250, 106 S.Ct. at 2511. The nonmoving party, however, cannot rest ***1302** upon mere denials or allegations in the pleadings. Nor may the nonmoving party simply argue facts supporting its claim will be developed later or at trial. Rather the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If reasonable minds could differ as to the import of the evidence, judgment

as a matter of law should not be granted. *See Anderson*, 477 U.S. at 250-51, 106 S.Ct. at 2511-12. If a plaintiff fails to support an essential element of a claim, however, summary judgment must issue because a complete failure of proof regarding an essential element renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53. With this standard at hand, the court addresses the motion of Control Data.

A. 29 U.S.C. § 1132(a)(1)(B)

Plaintiffs seek to enforce their rights to company paid premiums for their health, life and dental benefits. Specifically, counts I and II seek to enforce the terms of Control Data's "Disability Program," which contains as its only benefit the "promise to pay premiums" relating to a disabled employee's other benefit plans enrollment. Plaintiffs contend that the "Disability Program" is a formal welfare benefit plan under ERISA. Alternatively, plaintiffs seek to enforce the terms of the "Disability Program" to the extent that it is an informal welfare benefit plan covered under ERISA.

[1] The court rejects the contention that the "Disability Program," as defined by plaintiffs, is an informal plan under ERISA. Accepting plaintiffs' position, the "Disability Program" is contained only in SPDs distributed by Control Data. These documents, however, meet ERISA standards for SPDs. As SPDs are part of ERISA plan documents, they cannot constitute informal plans. Summary judgment on plaintiffs' alternative theory in Count II is granted.

Tied to the distinction between informal and formal plans, however, is a dispute over the source of Control Data's "promise to pay premiums." Plaintiffs argue that the

"Disability Program," and its "promise to pay premiums" is separate and distinct from any underlying health, life or dental plan. Plaintiffs maintain that the source of the "promise to pay premiums" or "Disability Program" is the 1983 and 1986 Disability Income Protection SPDs as well as the disability section of the 1989 Employee Benefits Manual. The distinction is crucial to plaintiffs' theory that the right to amend or terminate each of the welfare plans was not intended to reserve the right to amend or terminate the "promise to pay premiums" plan. Control Data contends that the source of this benefit is the underlying welfare benefit plans covering an employees' health, life and dental benefits. Control Data asserts that an agreement to pay benefit premiums cannot rationally be separated from the underlying benefit plans. As discussed infra, defendant's position is supported by the language of the formal plan documents for the Health Care Plan and Dental Assistance Plan. The court begins its discussion, however, with the assumption that the "promise to pay premiums" is a separate and distinct plan.

[2] The issue before the court is whether plaintiffs' right to receive company payment of their premiums for other welfare benefits vested when they qualified for long-term disability benefits. The plans at issue are welfare benefit plans. As such, ERISA's mandatory vesting requirements do not apply. 29 U.S.C. § 1051(1). A determination of the benefits provided, whether they vest or whether they are terminable or amendable, is simply a matter of contract interpretation. *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994) (citing *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir.1990) *cert. denied*, --- U.S. ----, 115 S.Ct. 1428, 131 L.Ed.2d 310 (1995)).

[3] [4] [5] [6] ERISA requires that "[e]very employee benefit plan ... be established and maintained pursuant to a

written plan document." 29 U.S.C. § 1102(a)(1). Summary plan descriptions ("SPDs"), also required by ERISA, explain the benefits of a particular welfare benefit plan and must be distributed to employees. 29 U.S.C. § 1022. SPDs are part of the ERISA plan documents. *Jensen*, 38 F.3d at 949. In interpreting the plan ***1303** documents, the court applies the law of trusts. *Jensen*, 38 F.3d at 950 ("The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'") (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989)). Vesting of welfare benefits is not presumed. Rather, the plan documents must show a specific expression of the employer's intent to be bound. *Anderson v. John Morrell & Co.*, 830 F.2d 872, 877 (8th Cir. 1987): *see also Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.) (holding that the intent to be bound must be "clear and express"), *cert. denied*, 510 U.S. 870, 114 S.Ct. 196, 126 L.Ed.2d 154 (1993). The burden is on the beneficiary seeking benefits to prove a fixed entitlement. *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1988).

[7] The court begins with the language of the plan documents. Plaintiffs argue that language in the 1983 and 1986 Disability Income Protection SPDs and in the disability section of the 1989 Employees Benefit Manual constitutes a promise that company paid premiums for health, life and dental benefit plans vested at the time of an employees' disability. Control Data's plan history places plaintiffs' argument in context. Beginning in the late 1970s, Control Data provided a number of employee benefit plans to its employees. Five plans are relevant for purposes of this action: the Health Care Plan, Flexible Health Care Plan,

Dental Assistance Plan, Life Insurance Plan and Long-Term Disability Plan. Each has a formal plan document. These plans, with the exception of the Flexible Health Care Plan, which was not adopted until 1988, were summarized in summary plan descriptions ("SPDs"). From 1978 through 1989, the company published and distributed separate summary plan descriptions ("SPDs") for each plan, with the exception of a SPD entitled "Disability Income Protection Plan SPD." This document did not summarize a particular formal plan, rather it summarized the "disability plans" of Control Data including Sick Leave, Short-Term Disability and Long-Term Disability.

The Disability Income Protection SPDs issued during this period provided that:

> While on Long-Term Disability Status the Company will pay the company-sponsored benefits (medical, life, and dental) for which you and your dependents were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans.

1985 Disability Income Protection SPD, pg. 7, attached as Exhibit B to the affidavit of Madge S. Thorsen, Docket No. 20; 1986 Disability Income Protection SPD, pg. 6, attached as Exhibit P to the affidavit of Madge S. Thorsen, Docket No. 20 (containing similar language). During this period, each SPD for the health, life and dental plans also referenced the company's promise to pay a disabled employee's benefit premiums. The Disability Income Protection SPDs also stated:

> Control Data expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or

discontinue it if it becomes necessary. This would be done only after careful consideration.

1985 Disability Income Protection SPD, pg. 21, attached as Exhibit B to the affidavit of Madge S. Thorsen, Docket No. 20; 1986 Disability Income Protection SPD, pg. 20, attached as Exhibit P to the affidavit of Madge S. Thorsen, Docket No. 20. According to plaintiffs, this reservation of rights clause is limited to the Long-Term Disability Plan. It does not reserve the right to change the company's promise to pay premiums for company sponsored benefits contained in the Disability Income Protection SPD.

In 1989, Control Data changed the format of its SPDs. That year, Control Data published and distributed one booklet, entitled "Employee Benefits Manual," instead of separate SPDs. This booklet purportedly summarized a number of formal plans including the Health Care Plan, Flexible Health Care Plan, Dental Assistance Plan, Group Life Insurance, Business Travel Accident Insurance, ***1304** Short-term Disability Plan, Long-term Disability Plan, Personal Investment Plan, Pension Plan, Dependent Child Care Plan and Premium Conversion Plan. *See* 1989 Employee Benefits Manual, pg. 166, attached as Exhibit E to the affidavit of Paul M. Floyd, Docket No. 17. The 1989 Manual provides, under the heading "Medical leave status," that:

> During the first 30 calendar days of disability, you continue to pay the monthly contributions for your other Control Data benefits, such as health, dental and life insurance.
>
> After 30 days of disability, your employment status may change to medical leave status. Medical information used to determine your eligibility for Short- and Long-Term

Disability will be used to determine your eligibility for medical leave status.

There are three types of medical leave status:

[Short-Term Disability Status, Long-Term Disability Status and Rehabilitation Status]

While you are on medical leave status and earning less than 100 percent of your normal income, Control Data pays your monthly contributions for your benefits until:

You are no longer considered disabled.

You or your dependents become ineligible for these benefits.

1989 Employee Benefits Manual, pg. 114, attached as Exhibit E to the affidavit of Paul M. Floyd, Docket No. 17.

[8] Relying on the above-quoted language, plaintiffs assert a vested interest in company paid premiums. The court disagrees. The language cited by plaintiffs at most states a present promise to pay these premiums for a specific period of time. Nothing in the language of the SPDs shows a specific intent to be unconditionally bound into the future. Nor can this language reasonably be read as expressing a promise to never change the benefits. The language indicates what the plan provided, not whether the provisions of the plan would be provided in perpetuity. Further, although the language read in isolation as plaintiffs' suggests does not contain a termination or amendment clause, the absence of such a clause does not automatically vest a promised benefit. The clear intent to provide a vested benefit is crucial. Unless plan documents provide otherwise, an employer may amend or

terminate welfare benefits without the need to reserve such a right. As the plans lack a specific expression of an intent to provide a vested right in the company paid premium, Control Data's termination of this benefit does not violate ERISA. Thus, the court grants Control Data's motion for summary judgment on Count I.

[9] The court also notes that a reservation of rights provision which reflects an employer's right to change or terminate a welfare plan is inconsistent with, and can defeat, a claim for vested benefits. *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994). The formal plan documents for the Health Care Plan and the Dental Assistance Plan contain a section on the continuation of benefits if a participant ceases active employment due to disability. The Health Care Plan provides that:

> If the Participant ceases active employment with the Employer by reason of an approved disability or medical leave or short- or long-term disability, his coverage hereunder shall continue for the period of such leave or disability, with the entire cost of such coverage being borne by the Employer.

Health Care Plan, Article III, § 3.03(d), pg. 12-13, attached to the affidavit of Ann M. Curme as Exhibit A, Docket No. 29; *see also* Dental Assistance Plan, Article III, § 3.03(c), pg. 8, attached to the affidavit of Ann M. Curme as Exhibit B, Docket No. 29 (same language). Each Health Care Plan and the Dental Assistance Plan also contains a reservation of rights clause that states:

> It is the expectation of each Employer that it will continue the Plan indefinitely, but each Employer reserves the right at any time to terminate the Plan as to its Employees.

* * * * * *

***1305** The right to amend the Plan at any time to any extent that it may deem advisable, is reserved to Control Data Corporation.

Health Care Plan, Article IX, §§ 9.01 and 9.03, pg. 30-31, attached to the affidavit of Ann M. Curme as Exhibit A, Docket No. 29; *see also* Dental Assistance Plan, Article VIII, §§ 8.01 and 8.03, pg. 29-30, attached to the affidavit of Ann M. Curme as Exhibit B, Docket No. 29. The SPDs for these plans also describe the company paid premium as well as the reservation of rights language. The clear and unequivocal termination and amendment clauses contained in the plan documents defeat plaintiffs' claim for a vested premium payment for disabled employees who participate in the Health Care Plan and the Dental Assistance Plan.

Even assuming that the language cited by plaintiffs was an ambiguous expression of an intent to provide vested company paid premiums to disabled employees, the resort to extrinsic evidence does not aid plaintiffs. Every welfare plan document submitted to the court contains a statement reflecting Control Data's right to amend or terminate the welfare benefits. Even the receipt of the benefit at issue is contingent on the existence of the Long-Term Disability Plan, a plan which could be terminated by the company. The contingent nature of the benefit is inconsistent with an intent to provide a vested benefit. Moreover, plaintiffs have come forward with no evidence that anyone at Control Data told any employee that the company paid premium was immune from change. The only extrinsic evidence in the record reflects an intent by Control Data to reserve its statutory right to change all aspects of its welfare plans.

[10] Count III alleges an alternative claim of breach of a unilateral contract under federal common law. Plaintiffs claim that Control Data made an offer to its employees that it would pay their welfare premiums in the event of disability, the offer was accepted and supported by consideration in the form of the employees' continued employment until disability. Even if such a contract does not run afoul of ERISA's prohibition against informal amendments, the court finds plaintiffs' argument to be without merit. *See Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir.1987). Defendant's motion for summary judgment on Count III is granted.

B. Promissory Estoppel[1]

---

[1] Plaintiffs moved the court to defer a decision on defendant's motion for summary judgment on Counts V-IX until the Supreme Court issued a decision in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted* --- U.S. ---, 115 S.Ct. 1792, 131 L.Ed.2d 720 (1995). The Supreme Court recently affirmed the Eighth Circuit's decision in *Howe. Varity Corp. v. Howe,* --- U.S. ----, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). In a letter to the court dated March 21, 1996, plaintiffs "submit that [the Supreme Court's holding] precludes summary judgment on their claim for breach of fiduciary duty." The basis of this belief, however, is not clear. Since the Eighth Circuit's decision in *Howe,* it has been the law in this circuit that beneficiaries may state a breach of fiduciary duty claim. The affirmance of that holding does not *per se* preclude summary judgment on plaintiffs' claim. Further, neither the Supreme Court nor the Eighth Circuit reached plaintiffs' alternative claims of promissory estoppel or interference with protected rights. *Id.* at 756 n. *5.* Thus, the recent decision in *Howe,* does not impact the court's consideration of these claims. Finally, although plaintiffs' have not conducted discovery, they have failed to submit an affidavit pursuant to Fed.R.Civ.P. 56(f) stating what facts have yet to be developed which support their opposition to Control Data's motion. Accordingly, the court will address the merits of Counts V-IX.

[11] [12] [13] In Count V, plaintiffs state a claim of promissory estoppel under federal common law. Plaintiffs may assert a claim of estoppel where the terms of a plan are ambiguous and the communications which form the basis of the estoppel claim constitute an interpretation of that ambiguity. *Slice v. Sons of Norway,* 34 F.3d 630, 634 (8th Cir.1994). Ambiguous plan provisions are essential to a claim based on federal common law estoppel. The court has already held that Control Data's "promise to pay premiums" is not ambiguous as to vesting. Even if the plan terms were ambiguous as to vesting, there is no evidence that defendants made any oral interpretations concerning the plan provisions. Plaintiffs cannot recover the benefits they seek on a theory of federal common law estoppel. Accordingly, summary judgment on Count V is granted. ***1306.** Count VI alleges an equitable estoppel claim under state law. As such, it is preempted. *Anderson v. John Morrell & Co.,* 830 F.2d 872 (8th Cir. 1987).

C. Breach of Fiduciary Duty

[14] Count VII alleges that Control Data breached its fiduciary duty in violation of 29 U.S.C. §§ 1104 and 1132(a)(3)(B). Count VIII states a claim for breach of fiduciary duty owed to members of the subclass of disabled employees. Plaintiffs claim that Control Data, a fiduciary under 29 U.S.C. § 1002(21), breached its duty:

> by including misrepresentations or omitting material information in communications with participants in connection with business decisions, failure to act or pay in accordance with plan documents, failure to effectuate proper disclosure of terms of plan in the summary plan descriptions, and favoring one group of plan participants over another.

Class Action Complaint, ¶ 121, pg. 42, Docket No. 1. Members of the subclass allege that Control Data breached its fiduciary duty by "making material and substantial changes to the Disability Program, including, but not limited to, the purported reservation of rights clause, without adequately informing the Subclass members of the existence or the effect of the change." Class Action Complaint, ¶ 125, pg. 43, Docket No. 1.

[15] ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries" of a plan. 29 U.S.C. § 1104(a)(1). Control Data did not act as a fiduciary, however, when it exercised its right to amend or terminate the welfare benefits at issue. *Curtiss-Wright Corp. v. Schoonejongen*, --- U.S. ----, ----, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995) (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)). Moreover, a failure to disclose that welfare benefits do not vest is not a breach of a fiduciary's duty under ERISA. *Jensen*, 38 F.3d at 953. Finally, plaintiffs have failed to come forward with any material misrepresentations in support of its breach of fiduciary duty claim. Summary judgment in favor of Control Data is warranted on Counts VII and VIII.

D. Interference with Protected Rights

[16] Count IX alleges defendant interfered with plaintiffs' protected rights in violation of 29 U.S.C. § 1140. Section 510 of ERISA provides that "[i]t shall be unlawful for any person to ... discriminate against a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. The action that plaintiffs challenge is

Control Data's decision to require disabled employees to pay their own premiums if they participate in company sponsored welfare plans. As Control Data may alter the terms of its welfare benefit packages, the amendment of these plans may not support a claim under section 510. Because plaintiffs' benefits did not vest, the plan modification at issue does not constitute a discriminatory act forbidden by section 510. Accordingly, the court grants defendant's motion for summary judgment on Count IX.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment is granted; and

2. Plaintiffs' motion for partial summary judgment is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

21 Employee Benefits Cas. 2456

Kent P. BARKER; Carla J. McAndrews; Martin J. Timmons, on behalf of themselves and all others similarly situated, Plaintiffs--Appellants,

v.

CERIDIAN CORPORATION, a Delaware corporation, individually and as successor in interest to Control Data Corporation, Defendant--Appellee.

No. 96-2429.

United States Court of Appeals,

Eighth Circuit.

Submitted Feb. 13, 1997.

Decided Aug. 26, 1997.

Employees sued their former employer alleging that employer's refusal to continue paying their insurance premiums violated the Employee Retirement Income Security Act (ERISA). The United States District Court for the District of Minnesota, David Doty, J., 918 F.Supp. 1298, granted employer's motion for summary judgment. Employees appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that genuine issue of material fact concerning whether plan documents permitted employer to change its long-term disability plan retroactively and refuse to pay insurance premiums for disabled employees precluded summary judgment.

Reversed.

1. FEDERAL COURTS 776
   170B ----

170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
1701Bk776 Trial de novo.
C.A.8 (Minn.) 1997.
Court of Appeals reviews de novo a grant of summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. FEDERAL CIVIL PROCEDURE 2543
170A ----
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2543 Presumptions.
C.A.8 (Minn.) 1997.
Court construes factual record and all reasonable inferences from record in light most favorable to party opposing summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. PENSIONS 26
296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.
C.A.8 (Minn.) 1997.

In interpreting terms of ERISA Plan, it is appropriate to apply de novo standard of review, giving language its common and ordinary meaning as reasonable person in position of plan participant, not actual participant, would have understood words. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. 1001-1461.

4. PENSIONS 62
296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.
C.A.8 (Minn.) 1997.

Though ERISA pension plans are subject to mandatory vesting requirements, welfare plans are not subject to such standards, and employers generally are free to amend or terminate these plans unilaterally. Employee Retirement Income Security Act of 1974, § 203, as amended, 29 U.S.C.A. 1053.

5. PENSIONS 62
296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.
C.A.8 (Minn.) 1997.

Simple fact that ERISA does not require vesting of welfare benefit plans does not mean that welfare benefit plan will never vest; employer and employee may contract for post-employment welfare benefits that vest. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. § § 1001-1461.

6. PENSIONS 26
296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.
C.A.8 (Minn.) 1997.

Any promise to provide ERISA vested benefits must be incorporated, in some fashion, into formal written ERISA plan. Employee Retirement Income Security Act of 1974, § 402(a)(1), as amended, 29 U.S.C.A. § 1102(a)(1).

7. PENSIONS 47
296 ----
296II Employee Pension and Benefit Plans
296II(B) Administration
296k47 Notice and disclosure requirements.
C.A.8 (Minn.) 1997.

Summary plan descriptions are considered part of ERISA plan documents. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

8. PENSIONS 47
296 ----
296II Employee Pension and Benefit Plans
296II(B) Administration
296k47 Notice and disclosure requirements.
C.A.8 (Minn.) 1997.

Adequate disclosure to employees is one of ERISA's major purposes. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

9. PENSIONS 47
296 ----
296II Employee Pension and Benefit Plans
296II(B) Administration
296k47 Notice and disclosure requirements.
C.A.8 (Minn.) 1997.

If provisions of formal ERISA plan conflict with summary plan provisions, summary plan description provisions prevail. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

10.PENSIONS 26

296 ----

296II Employee Pension and Benefit Plans

296II(A) In General

296k24 Contractual Plans; Trusts

296k26 Construction in general.

C.A.8 (Minn.) 1997.

When interpreting ERISA plan documents, court looks to law of trusts; terms of trusts created by written instruments are determined by provisions of instrument as interpreted in light of all circumstances and such other evidence of intention of settlor with respect to trust as is not inadmissable. Employee Retirement Income Security Act of 1974, § 402(a)(1), as amended, 29 U.S.C.A. § 1102(a)(1).

11.PENSIONS 141

296 ----

296II Employee Pension and Benefit Plans

296II(K) Actions to Recover Benefits

296k141 Evidence and fact questions.

C.A.8 (Minn.) 1997.

In determining if evidence other than ERISA plan documents is admissible to interpret plan provision, court looks to language of provision at issue and considers whether provision is ambiguous. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

12.PENSIONS 47

296 ----

296II Employee Pension and Benefit Plans

296II(B) Administration

296k47 Notice and disclosure requirements.

C.A.8 (Minn.) 1997.

ERISA summary plan description is intended to be document easily interpreted by layman; employee should not be required to adopt skills of lawyer and parse specific undefined words throughout entire document to determine whether they are consistently used in same context. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

13.PENSIONS 62
296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.
C.A.8 (Minn.) 1997.

Employees carry burden of showing agreement or other demonstration of employer intent to vest welfare benefits under ERISA. Employee Retirement Income Security Act of 1974, 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

14.PENSIONS 62
296 ----
296II Employee Pension and Benefit Plans
296II(C) Rights and Interests Created
296k62 Vesting.
C.A.8 (Minn.) 1997.

Whether welfare benefits vest is matter of contract interpretation, under ERISA. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

15.EVIDENCE 448
157 ----
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument

157k448 Grounds for admission of extrinsic evidence.
C.A.8 (Minn.) 1997.

***628** If contract is ambiguous, court may weigh extrinsic evidence to assist in construing language.

16.FEDERAL CIVIL PROCEDURE 2497.1
170A ----
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 In general.
C.A.8 (Minn.) 1997.

Genuine issue of material fact concerning whether plan documents permitted employer to change its long-term disability plan retroactively and refuse to pay insurance premiums for disabled employees precluded summary judgment on employee's ERISA claim. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

17.CONTRACTS 143.5
95 ----
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 Construction as a whole.
C.A.8 (Minn.) 1997.

Courts have duty to interpret different clauses of contract in harmonious fashion, giving meaning to all clauses where possible

18.CONTRACTS 162
95 ----

95II Construction and Operation
95II(A) General Rules of Construction
95k162 Conflicting clauses in general.
C.A.8 (Minn.) 1997.
If two clauses of contract appear to be in conflict, preferred interpretation is one that gives harmonious interpretation to clauses to avoid rendering either one nugatory.

19.PENSIONS 26
296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.
C.A.8 (Minn.) 1997.
When reading ERISA plans, each provision should be read consistently with others and as part of integrated whole. Employee Retirement Income Security Act of 1974, §§ 2-4402, as amended, 29 U.S.C.A. §§ 1001-1461.

20.PENSIONS 26
296 ----
296II Employee Pension and Benefit Plans
296II(A) In General
296k24 Contractual Plans; Trusts
296k26 Construction in general.
C.A.8 (Minn.) 1997.
Terms of ERISA plans must be construed so as to render none of them nugatory and to avoid illusory promises. Employee Retirement Income Security Act of 1974, § § 2-4402, as amended, 29 U.S.C.A. § § 1001-1461.

***630** John Murray, Minneapolis, MN, argued, Matthew B. Newman, Edina, MN (Terrence M. Fruth, Paul M. Floyd, on the brief), for Plaintiffs-Appellants.

Richard A. Kaplan, Minneapolis, MN, argued (Madge S. Thorsen, Thomas W. Pahl, Minneapolis, MN, on the brief), for Defendant-Appellee.

Before McMILLIAN, JOHN R. GIBSON, and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Appellants, a certified class of disabled employees who receive disability benefits under a long-term disability plan, appeal the district court's grant of summary judgment for their employer, Ceridian Corporation, that allowed Ceridian to stop paying the employees' health, dental, and life insurance premiums. The employees bring their claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994). They argue that the district court's grant of summary judgment was erroneous because Ceridian provided vested disability benefits and did not unambiguously reserve the right to retroactively change the level of disability benefits that employees would receive in the future. They further argue that the extrinsic evidence they submitted created a genuine issue of material fact concerning Ceridian's right to change disability benefits retroactively. Because the long-term disability plan does not unambiguously reserve to Ceridian the right to change the disability benefits retroactively, a genuine issue of material fact exists. Accordingly, we reverse the district court's judgment and remand for additional discovery and a trial.

Appellants Kent P. Barker, Carla J. McAndrews, and Martin J. Timmons represent a class of disabled employees of Ceridian Corporation. The class includes all employees of

Ceridian, formerly known as Control Data Corporation,[1] who were disabled before January 1, 1991 for whom Ceridian paid health, life, and dental insurance premiums on or before December 31, 1993.[2] Until December 31, 1993, Ceridian paid each class member's premiums for the life, health, and dental insurance in which they were enrolled at the time they became disabled. Ceridian also paid the disabled employees 60% of their pre-disability wage. Beginning January 1, 1994, Ceridian stopped paying the premiums and required the employees to pay their own premiums to continue their insurance coverage.

Appellants brought this action alleging that Ceridian's refusal to continue paying their insurance premiums violates ERISA. The parties' arguments revolve around the ERISA plans offered by Ceridian. Years ago, Ceridian adopted several benefit plans for its employees, including a health care plan, dental assistance plan, life insurance plan, and disability plan. Formal plan documents described each plan. In addition, as required by ERISA, 29 U.S.C. § 1022 (1994), Ceridian provided its employees with a summary plan description for each plan that described the various benefits offered by the plans and claim procedures. For several years the company issued summary plan descriptions to employees in separate booklets for each type of benefit, but starting in 1989 Ceridian combined the summary plan description ***631** for all of the various plans into a single benefits manual.

---

[1] Ceridian is the successor-in-interest to Control Data Corporation. Therefore, we will refer to the appellee as Ceridian.

[2] The class specifically excluded those individuals who were members of the class in *Chiles v. Ceridian Corporation, Inc.*, a suit filed in the United States District Court for the Western District of Oklahoma. An opinion regarding this class action is recorded at 95 F.3d 1505 (10th Cir. 1996).

Before 1989 the Disability Income Protection summary plan descriptions summarized three disability plans: sick leave, short-term disability, and long-term disability. Under the long-term disability plans, disabled employees were eligible for long-term disability status beginning after their fifth consecutive month of disability. Employees who qualified under this plan were entitled to up to 60% of their pre-disability salary. The summary plan descriptions also provided: "While on Long-Term Disability Status the company will pay the premiums for all the company-sponsored benefits (medical, life, and dental) for which you and your dependents were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans."[3] A chart in the summary plan descriptions reiterated Ceridian's promise to pay the disabled employees' insurance premiums. The formal document for the long-term disability plan, however, did not contain any reference to the terms, conditions, or descriptions of health, dental, or life insurance benefits. During the period before 1989 the individual plan documents for the dental, life, and health insurance plans also stated that Ceridian would pay the insurance premiums during the employee's disability.

The plans in effect before 1989 also contained provisions discussing plan amendment and termination. The Disability Income Protection summary plan descriptions provided: "Control Data expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration." The amendment and

[3] The quoted language is from the 1986 Disability Income Protection summary plan description. The language of the 1983 summary plan description is slightly different, though substantively the same.

termination language in the formal plan document differed slightly from the language in the summary plan descriptions. The formal plan allowed plan amendments if deemed advisable by Ceridian and reserved Ceridian's right to terminate the plan at any time.

The Long-Term Disability Plan's reservation of rights provision included additional language relevant to this action. Before 1989 the disability summary plan descriptions expressly provided: "If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan." The formal long-term disability plan made the same promise. This language was not found in the documents for the dental, health, or life insurance benefit plans. Instead, the termination provision in the 1984 summary plan description of the dental and life insurance plan, and the 1983 summary plan description of the health care plan provided: "If, while you or your dependents are covered under this plan, the plan terminates or the class of employees of which you are a member has its coverage terminated, then no benefits (including extended benefits) will be payable to you for any charges, fees, or expenses incurred on or after that date of termination of the policy or termination of the class." The 1984 life insurance summary plan description included the same provision.

Effective January 1, 1989, Ceridian issued an employee benefits manual that combined the summary plan descriptions for its employee benefit plans. The disability section of the 1989 Benefits Manual repeated Ceridian's agreement to pay the health, life, and dental insurance premiums of disabled employees. However, the 1989 Benefits Manual contained a different reservation of rights provision: "While [Ceridian]

plans to continue these plans and programs, it reserves the right to change or cancel them at any time." The manual made no mention of Ceridian's promise to continue paying disability benefits if Ceridian terminated the plan, as promised in previous Long-Term Disability summary plan descriptions. The formal Long-Term Disability Plan in effect at that time, however, continued to contain this agreement: "Notwithstanding termination of the Plan, a ***632** Participant who is Totally Disabled on the effective date of the Plan termination and is otherwise entitled to benefits hereunder, shall continue to receive benefits in accordance with the terms of the Plan."

In 1991, Ceridian issued a new employee benefits manual that stated that Ceridian would no longer pay the health, dental, and life insurance premiums for employees who became disabled on or after January 1, 1991. Ceridian told Barker, a class representative, that this change only applied to employees who became disabled on or after January 1, 1991. This change did not affect the benefits Ceridian paid to the class members, which included 60% of their pre-disability wage and 100% of their life, health, and dental insurance premiums.

In 1992, Ceridian changed its long-term disability plan again. Effective January 1, 1992, Ceridian allowed active, non-disabled employees to choose to pay a higher disability premium in return for an increase in their long-term disability income benefit to 70% of their pre-disability earnings. Ceridian again explained to Barker that this change only applied prospectively.

In the fall of 1993, Ceridian notified the disabled employees that it would stop paying 100% of their health, life, and dental insurance premiums beginning January 1, 1994. The disabled

employees then brought this action. The district court held that the employees had no vested interest in company-paid premiums because the plan documents showed that Ceridian had no specific intent to be unconditionally bound in the future. Further, the district court concluded that the termination and amendment clauses included in the plan documents defeated the employees' claim for vested insurance premium benefits. Even if the language in the plans was ambiguous and could be interpreted as expression of an intent to provide vested company-paid premiums to disabled employees, the district court concluded that the only extrinsic evidence in the record reflected Ceridian's intent to reserve its right to change all aspects of the plan. Accordingly, the district court granted summary judgment for Ceridian.

On appeal, the disabled employees argue that the district court's grant of summary judgment was erroneous because Ceridian provided vested disability benefits and did not unambiguously reserve the right to change the level of disability benefits retroactively. The employees also contend that the extrinsic evidence they submitted creates a genuine issue of material fact concerning Ceridian's right to change disability benefits retroactively. Ceridian argues that the plan documents did not provide a vested right to 100% payment of the insurance premiums and that Ceridian unambiguously reserved its right to change or terminate the welfare benefits paid to the disabled employees.

[1] [2] [3] We review de novo a grant of summary judgment. *See McKee v. Federal Kemper Life Assurance Co.*, 927 F.2d 326, 328 (8th Cir.1991). Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). We

construe the factual record and all reasonable inferences from the record in the light most favorable to the party opposing summary judgment. *See Schrader v. Royal Caribbean Cruise Line, Inc.*, 952 F.2d 1008, 1013 (8th Cir.1991). In interpreting the terms of this ERISA Plan, it is appropriate to apply a de novo standard of review, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989), "giving the language its common and ordinary meaning as a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir.1996) (quotations omitted).

I.

[4] [5] ERISA distinguishes between two kinds of employment benefits--welfare benefits and pension benefits. *See* 29 U.S.C. § 1002(1)-(2) (1994). The employees concede that the plans at issue before us are employee welfare benefit plans. Though pension plans are subject to mandatory vesting requirements, *see* 29 U.S.C. § 1053 (1994), welfare ***633** plans are not subject to such standards, and employers generally are free to amend or terminate these plans unilaterally. *See Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir.1994) *cert. denied*, 514 U.S. 1050, 115 S.Ct. 1428, 131 L.Ed.2d 310 (1995). However, the simple fact that ERISA does not require vesting of welfare benefit plans does not mean that a welfare benefit plan will never vest. An employer and employee may contract for post-employment welfare benefits that vest. *See In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986).

[6] [7] [8] [9] ERISA requires that employee benefit plans be established by a written instrument. *See* 29 U.S.C. § 1102(a)(1). Therefore, any promise to provide vested benefits must be "incorporated, in some fashion, into the formal written ERISA plan." *Jensen,* 38 F.3d at 949 (quotation omitted). Summary plan descriptions are considered part of ERISA plan documents. *See Id.* Adequate disclosure to employees is one of ERISA's major purposes. *See Id.* at 952. Because of the importance of disclosure, in the event of a conflict between formal plan provisions and summary plan provisions, the summary plan description provisions prevail. *See Id.*

[10] [11] When interpreting ERISA plan documents, we look to the law of trusts: "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissable.'" *Id.* at 950 (quoting *Bruch,* 489 U.S. at 112, 109 S.Ct. at 955). In determining if other evidence is admissible we look to the language of the plan provision at issue and consider whether the provision is ambiguous:

> that intent [of the settlor] is first sought by careful examination of the trust clause in question, giving the words in that clause their ordinary meanings. If the construction question cannot be resolved by reference to the clause alone, the court will examine the entire trust instrument to determine the creator's intent and purposes.... [T]he third step becomes necessary when the intent or meaning of the settlor .... cannot be determined by reference to the provisions of the trust instrument itself. Extrinsic evidence will be admitted by the court to assist it in determining the meaning and effect of the particular clause.

Id. (quotation omitted).

II.

As described above, the reservation of rights clauses in the long-term disability plans provided that if the plans terminated Ceridian would continue paying disability benefits to those totally disabled at the time of the plan termination. This differed from the reservation of rights clauses in the health, dental, and life insurance plans, which simply provided that Ceridian might change or discontinue the plans if it became necessary. Therefore, to determine which reservation of rights provisions apply to the disabled employees' claims, we must determine the source of Ceridian's promise to pay the insurance premiums.

The employees contend that the promise to pay the insurance premiums stems from the long-term disability plan itself. The 1983 and 1986 plans made several references to the health, dental, and life insurance premiums. For example, the plans provided that while an employee is on long-term disability status Ceridian will pay all the medical, life, and dental benefits for which the employee and dependents were enrolled before the disability began. The plans also provided a chart summarizing benefits available during disability. Each of these charts expressly provided that Ceridian would pay premiums for health, dental, and life insurance programs for employees on long-term disability status.

Ceridian points to the plan documents for the health, dental, and life insurance plans that discuss how the respective benefits will be handled during a period of disability. In light of this language, Ceridian argues that its liability for payment of insurance premiums comes from the separate insurance

coverage plans. Ceridian contends the disability ***634** plan is simply for income protection, and does not in its own afford a right to the insurance premiums.

In considering the conflicting arguments, we reiterate that we apply a de novo standard of review to interpret the terms of a plan and give the plan's language the "common and ordinary meaning ... a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words." *See Chiles,* 95 F.3d at 1511.

[12] We hold that a reasonable person in the position of a plan participant would believe the language of the disability summary plan descriptions assured payment of the various insurance premiums. "A [summary plan description] is intended to be a document easily interpreted by a layman; an employee should not be required to adopt the skills of a lawyer and parse specific undefined words throughout the entire document to determine whether they are consistently used in the same context." *Id.* at 1517-18. The long-term disability summary plan descriptions repeatedly promise that Ceridian will pay company-sponsored insurance premiums. In 1989 only the long-term disability summary plan description contained the promise to pay the insurance premiums. The individual life, health, and dental insurance plans did not promise that Ceridian would continue to pay insurance premiums for employees who become disabled.

Finally, in response to Ceridian's argument that the disability plan benefits only include income protection, in a real sense requiring disabled employees to pay their insurance premiums out of their 60% salary replacement benefit increases their income loss. *See Chiles,* 95 F.3d at 1517. Indeed, Ceridian's prospective plan amendment in 1992 that allowed disabled employees to receive 70%, rather than 60%,

of their pre-disability earnings, may well have been intended to help compensate for Ceridian's 1991 plan change that required employees who became disabled after January 1, 1991 to pay part of their own insurance premiums. A reasonable person in the position of a plan participant would conclude upon reading the plans that the long-term disability plan, and not the individual health, life, and dental insurance plans, provide payment of the insurance premiums. *Cf. Id.* at 1516-19 (not possible to determine from the language of the long-term disability plan what benefits the plan includes, and therefore issue is not appropriate for summary judgment).

III.

[13] Now that we have determined which plans control our analysis, we turn to the employees' argument that Ceridian's promise to pay insurance benefits until they were no longer disabled vested at the time the employees became disabled, and that Ceridian did not unambiguously reserve the right to change the level of disability benefits retroactively. Because welfare benefits do not statutorily vest under ERISA, the employees carry the burden of showing an agreement or other demonstration of employer intent to vest benefits. *See Houghton v. SIPCO, Inc.*, 38 F. 3d 953, 957 (8th Cir. 1994).

[14] [15] In support of their argument the employees cite *Local Union No. 150-A, United Food & Commercial Workers International Union v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985). They argue that this case provides that benefits are vested when receipt of benefits depends on an employee's status. In *Dubuque Packing*, the court first looked at the language in the plan documents and determined that the language was ambiguous. After examining the extrinsic evidence, the court concluded that the plaintiffs had proved that the parties intended the benefits to vest when the parties

retired. *Id.* at 70. *Dubuque Packing* thus stands for the proposition that parties can intend to provide vested benefits. We therefore look to see whether there was an intent to provide vested benefits in this case. Because welfare benefits do not automatically vest as a matter of law, the issue is "simply one of contract interpretation," *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir.1988), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989), which is a question of law. *See Dubuque Packing*, 756 F.2d at 69. Where a contract is ambiguous, ***635** a court may weigh extrinsic evidence to assist in construing the language. *See Id.*

The language of the 1986 disability income protection summary plan description provides: "While on Long-Term Disability Status the company will pay the premiums for all the company-sponsored benefits (medical, life, and dental) for which you and your defendants were enrolled before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans." The language of the 1983 summary plan description and the 1985 formal plan make the same promise. The 1983 and 1986 disability summary plan descriptions, however, state: "[Ceridian] expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration." The 1989 disability summary plan description contains a similar reservation of rights provision.

[16] In short, we are faced with a clause that provides that Ceridian will pay insurance premiums until an employee is no longer disabled or no longer eligible for the plan and a reservation of rights clause that allows Ceridian to change or discontinue the plan. The conflict between these clauses

brings us face to face with difficult contract interpretation questions. Several courts have considered similarly conflicting clauses and have not answered this puzzling question uniformly. *See, e.g., Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 306-09 (7th Cir. 1996); *Chiles*, 95 F.3d at 1511-14; *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 902-905 (3rd Cir.1995); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855-58 (4th Cir.1994), *cert. denied*, 514 U.S. 1057, 115 S.Ct. 1442, 131 L.Ed.2d 321 (1995); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 605-10 (7th Cir.), *cert. denied*, 510 U.S. 909, 114 S.Ct. 291, 126 L.Ed.2d 240 (1993). This court recently has addressed this question in *Jensen*.

In *Jensen*, a class of retired employees brought suit against SIPCO, their employer, after SIPCO changed its medical benefit plan for retirees. The plan at issue provided that SIPCO would pay medical benefits until a retiree died, or a spouse divorced, or a child married or reached age nineteen. 38 F.3d at 950. Observing that this promise was "at most an ambiguous expression of an intent to vest retiree benefits," *Id.*, we then considered the plan's reservation of rights clauses, which provided, "[T]he Company shall have the right and power to alter, amend, or annul any of the provisions of this ... Plan.... Unless otherwise expressly provided therein, amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment." *Id.* at 948-49. Focusing on the language which allowed SIPCO to amend or terminate "any of the provisions of th[e] ... Plan," we held that the reservation of rights provisions at issue were not free from ambiguity. *Id.* at 950. We observed that "the question at this stage of the analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence." *Id.* We held that the reservation of rights clauses were "not facially unambiguous--they leave at least

some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired." *Id.* Because of the ambiguity in the plan, we held that the district court properly considered the extrinsic evidence. *Id.*

The reservation of rights clauses in *Jensen* and in the plans before us today are materially indistinguishable. Both plans provided a welfare benefit until a person was no longer eligible for the plan, yet retained the right to amend or terminate the plan. *Jensen* thus controls our analysis, and we hold that Ceridian's plans are ambiguous concerning whether Ceridian can retroactively change benefits to disabled employees. *See also American Fed'n of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (to reach a trier of fact it is enough to point to written language that could be interpreted as a promise to vest the recipient's benefits).

Ceridian attempts to distinguish *Jensen*, arguing that the reservation of rights clauses ***636** in the two cases differ. Specifically, Ceridian contends that the language in SIPCO's plan states that plan amendments would not apply to persons who are receiving pensions before the date of the amendment unless the amendment said so expressly. Ceridian says this clause made the reservation of rights clauses in *Jensen* more ambiguous than the clause before us. *Jensen*, however, did not mention this part of the termination clause in its discussion of the plan's ambiguity. 38 F.3d at 950. In fact, we believe this phrase makes SIPCO's plan even less ambiguous than Ceridian's plan because SIPCO implicitly reserved the right to make retroactive changes to its plan so long as it expressly provided that the amendments would apply to already retired employees. SIPCO expressly sent

those employees that already had retired a new summary plan description which contained a new clause. This clause informed the recipients that SIPCO reserved the right to change or amend the plan. *Id.* at 948. Therefore, the employees in this case have a stronger argument than those who prevailed in *Jensen.*

In contrast to *Jensen's* termination of rights clause, nothing in Ceridian's plan documents imply that Ceridian reserved the right to change the benefits to already disabled employees. To the contrary, Ceridian's plan language provided assurances that previously disabled employees would continue to receive benefits. The reservation of rights clause was tempered by the promise: "If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claims for such benefits will continue as long as you remain totally disabled as defined by the plan."[4] This termination clause is in stark contrast to the termination clause included in the individual health, life, and dental plans. The 1984 summary plan description of the dental and life insurance plan, and the 1983 summary plan description of the health plan provided: "If, while you or your dependents are covered under these plans, the plans terminate or the class of employees of which you are a member has its coverage terminated, then no benefits (including extended benefits) will be payable to you for any charges, fees, or expenses incurred on or after that date of termination of the policy or termination of the class."[5]

---

[4] The 1989 summary plan description did not include, nor contradict, this promise. Nonetheless, the promise was included in the formal plan document that was in effect in 1989. We conclude, therefore, that the 1989 Long-Term Disability Plan included this promise.

[5] This quoted language is from the 1984 summary plan description for the dental and life insurance plans. The language for the 1983 health care plan differs slightly, though it is substantively the same.

The differences in the wording of the termination clauses in the disability plan and the individual health, dental, and life insurance plans indicate Ceridian was more interested in providing continuing payment of insurance premiums to disabled employees than to other employees. The question we are faced with is the amount of greater protection. Ceridian cites *Chiles*, and argues that Ceridian did not terminate the plan, but simply changed the benefits provided by the plan. Therefore, it concludes that the termination clause providing for continuation of benefits when the plan is terminated was not triggered. In *Chiles*, a class of disabled employees filed suit against their employer, Ceridian, arguing that Ceridian violated ERISA when Ceridian changed the benefits it paid to the disabled employees. The Tenth Circuit determined that only termination of the plan would vest disability benefits, rejecting the employees' arguments that the benefits vested once an employee became disabled. 95 F.3d at 1513. The Tenth Circuit held that the long-term disability plan had indeed terminated. *Id.* at 1516. Accordingly, whatever benefits the termination clause referred to were vested under the language of the plan.[6]

We are satisfied we should not apply *Chiles's* reasoning to the case before us. *Chiles* involved former employees of Imprimis, a ***637** division of Control Data. *See Id.* at 1508. Unlike the class in *Chiles*, members of the class before us were not employees of Control Data's Imprimis Division. *See Id.* at 1509-10 n. 1. In fact, *Chiles* points out that a separate class of employees had been formed for the action before us. *See Id.*

---

[6] The Tenth Circuit concluded that a genuine issue of material fact existed concerning what benefits were covered by the termination clause and remanded the case to the district court. 95 F.3d at 1516-19.

Chiles also indicates that Control Data sold Imprimis to Seagate Technology in 1989. *See Id.* at 1508. Before the sale, *Chiles*'s class of employees had been deemed disabled and were receiving disability benefits under a Control Data long-term disability plan. *See Id.* The plan seemed to contain the same provisions as the plan before us as described above, which provided that the Company would pay the premiums for the life, medical, and dental insurance programs in which an employee was enrolled before disability began. As part of the sale, Seagate agreed to administer the Imprimis Division employees' rights according to the terms of the Control Data Plan. *See Id.* Thereafter, Seagate created a new long-term disability plan. *Set Id.* All aspects of the administration of the long-term disability plan thus transferred to Seagate, but Control Data continued to administer the health, life, and dental insurance plans. *See Id.* at 1508-09. *Chiles* went on to hold that Control Data's long-term disability plan terminated after the sale of Imprimis Division, as none of the Control Data disability plan operation and administrative procedures remained in effect. *Id.* at 1516.

Nothing in the record before us indicates that a similar course of transactions occurred with respect to the plans applicable to the parties in this case.

We also observe that other circuits have criticized the reasoning upon which *Chiles* is based. For example, in evaluating an ERISA plan in *Diehl,* the Seventh Circuit specifically concluded that it "need not undertake such interpretive gymnastics" as used *in Chiles. See* 102 F.3d at 307. In *Grain Millers,* the Second Circuit observed that *Chiles* required that the right to receive lifetime coverage must be found in plan documents and stated in clear and express language. 116 F.3d at 980. *Grain Millers,* however,

emphasized that this was not the law of the Second Circuit. *Id.* The Second Circuit required only that an employee point to written language capable of reasonably being interpreted as creating a promise of vested benefits in order to reach a trier of fact. *Id.*

Further, *Chiles* itself pointed out that recent cases from other circuits were not uniform in determining whether a general reservation of rights clause unambiguously controls a separate promise of benefits upon retirement. *Chiles*, 95 F.3d at 1511-12. It specifically contrasted the difference in the Third Circuit's decision on this issue as demonstrated in *In re Unisys*, 58 F.3d at 904 (a general reservation of rights clause unambiguously controls a separate promise of benefits upon retirement), with the approach of this circuit as demonstrated in *Jensen*, 38 F.3d at 950 (two general reservation of rights clauses not facially unambiguous). *Id.* at 1512. Though in *Chiles* the Tenth Circuit followed the *In re Unisys* approach, *Jensen* is a recent well-reasoned opinion of this circuit that we are bound to follow. Therefore, *Jensen* provides a roadmap for our analysis in the case before us today.

[17] [18] [19] [20] The disability plan provides that Ceridian will pay the health, life, and dental premiums for disabled employees until they are no longer disabled. In support of this promise, the plan assured that if the plan was terminated, benefits would continue for any employee totally disabled when the plan terminated. Courts have a duty to interpret different clauses of a contract in a harmonious fashion, giving meaning to all clauses where possible.

> [A]n elementary rule of contract interpretation is that a contract should be construed so as to give effect to all the contract's provisions. Similarly, if two clauses of a contract appear to be in conflict, the preferred interpretation is the

one that gives a harmonious interpretation to the clauses in order to avoid rendering either one migatory.

Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370, 374 (8th Cir.1983) (citation and quotation omitted). When reading plans "[e]ach provision should be read consistently ***638** with the others and as part of an integrated whole. Further, the terms must be construed so as to render none of them nugatory and to avoid illusory promises." *DeGeare v. Alpha Portland Indus., Inc.,* 837 F.2d 812, 816 (8th Cir.1988), *vacated and remanded,* 489 U.S. 1049, 109 S.Ct. 1305, 103 L.Ed.2d 575 (1989).[7] Here, if Ceridian faced no limit on its ability to change the level of benefits paid to disabled employees the coverage could become all but nominal and make the promise of lifetime benefits illusory. Thus, the employees would be entitled to few or no benefits, but the termination clause still would not be applicable to protect the benefits received by those already disabled at the time of termination. *See Diehl,* 102 F.3d at 309-10 (determining that if a company was allowed to modify coverage until it became all but nominal, the promise of lifetime benefits would look rather illusory, and therefore reading the plans to require the company to expend reasonable efforts to keep benefits at a level commensurate with benefits provided under the original agreement).

---

[7] The Supreme Court's remand of *DeGeare* was based on its decision in *Bruch.* In *DeGeare,* we held that a plan's fiduciary's interpretation of plan terms was entitled to deference on review. 837 F.2d at 814-15. Our discussion, however, did not end there, and we went on to hold that the administrator correctly construed the plan documents. *Id.* at 815. We then applied basic contract interpretation law established in our circuit. *Id.* at 815-16. *Bruch*'s holding does not affect the contract interpretation principles discussed in the central part of *DeGeare* and thus, the basic contract interpretation principles of *DeGeare* still apply. *See Howe v. Varity Corp.,* 896 F.2d 1107, 1109 n. 4 (8th Cir. 1990).

In short, we hold that the reservation of rights clauses at issue here and in *Jensen* are materially indistinguishable. The reservation of rights clauses, read with the language promising that Ceridian will pay insurance benefits until an employee is no longer eligible for the plan, and with the language promising that Ceridian will continue paying benefits to disabled employees at the time of the plan termination, is ambiguous.

IV.

Where a contract is ambiguous, a court may weigh extrinsic evidence. The district court, after concluding that the termination and amendment clauses defeated the employees' claim for vested premium payments, also considered the extrinsic evidence. The district court concluded that the extrinsic evidence did not help the employees, because the only extrinsic evidence before the court indicated Ceridian's intent to reserve its right to change all aspects of the disability benefit plans.

Some of the more significant extrinsic evidence offered by the employees included the fact that before 1994 Ceridian had made only prospective changes to the disability benefits provided under the long-term disability plan. Second, the employees offered the affidavit of Barker, one of the class representatives. Barker spent his entire career working in the area of employee benefits. He worked for Ceridian as the Manager of its Corporate Employee Benefits Department from 1968 to 1975. In this position Barker was responsible for many aspects of the individual domestic corporate employee benefits, including the design, administration, communication, and funding of Ceridian's health, life, dental, disability, and retirement plans. In 1986, Ceridian rehired Barker as its principal consultant for international employee

benefits. At this time he also provided support for Ceridian's domestic personnel relations, primarily in the health, life, and disability benefit areas. In his affidavit Barker stated that he went on long-term disability status in 1988, relying on Ceridian's promises, that for as long as he was disabled, he would receive 60% of his wages and 100% of welfare benefits premiums. Though Barker knew that the benefits could be changed, Barker never believed that Ceridian could retroactively change its obligation to pay the insurance premiums.

We observe that the extrinsic evidence presented by the employees is similar to the extrinsic evidence offered in *Jensen*. In *Jensen*, the extrinsic evidence offered at trial included evidence that the company's former employee relations manager had considered medical benefits to be a vested benefit and that the company previously had made only prospective changes to retiree medical benefits. ***639.** 38 F.3d at 951. The evidence offered by the employees here is more than enough to show that a genuine issue of material fact exists concerning whether Ceridian could change its long-term disability plan retroactively and refuse to pay the insurance premiums for the disabled employees.

Accordingly, we remand to the district court for proceedings consistent with this opinion.

CONTROL DATA CORPORATION

LONG TERM DISABILITY PLAN

• • •

ARTICLE VII

Amendment and Termination

• • •

7.02 The right to amend the Plan at any time to any extent that it may deem advisable, is reserved to Control Data Corporation. Such amendment shall be stated in an instrument in writing, executed in the name of Control Data Corporation by its President or a Vice President, attested by the Secretary or an Assistant Secretary. Upon delivery of an executed counterpart of such instrument to the Trustee, the Plan shall be deemed to have been amended in the manner therein set forth, and all Participants and Employers shall be bound thereby.

CONTROL DATA CORPORATION

LONG TERM DISABILITY PLAN

• • •

ARTICLE II

Definitions and Interpretations

• • •

2.03 The Term "Participant" means any individual becoming covered under the terms and provisions of the Plan.